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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,

v.

PEDRO CASTRO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

FRANK J. MCGEE,*
STEVEN M. GUINEY,
MCGEE & PHILLIPS,
1952 Ocean Street,
Marshfield, Massachusetts 02050.
(617) 834-4690

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the United States Court of Appeals for the first Circuit erred in vacating the instant cases as moot, particularly in light of this Court's recent decision in *Firefighter's Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984).

Parties.

The caption at 3a identifies all parties to the proceedings in the Court of Appeals for the First Circuit whose judgment is sought to be reviewed. They are the same parties to the initial proceedings in this Court in Nos. 82-185, 82-246, and 82-259. Boston Firefighters Union, Local 718 and Boston Police Patrolmen's Association, Inc., were petitioners in Nos. 83-866 and 83-885 respectively.

The city of Boston and its Police Commissioner were parties in the District Court proceeding but took no appeals.

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PEDRO CASTRO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Boston Police Patrolmen's Association, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on December 7, 1984.

Opinions Below.

On remand from this Court for further consideration in light of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984), the United States Court of Appeals for the First Circuit reaffirmed its prior decision in *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (1st Cir. 1983) vacating the August 7, 1981 order of the United States District Court for the District of Massachusetts and remanding the instant proceedings to that court with instructions to dismiss as moot the plaintiffs motion for modification.

On January 4, 1985, the United States District Court for the District of Massachusetts, in compliance with the mandate of the United States Court of Appeals for the First Circuit issued December 28, 1984, issued an order dismissing as moot the plaintiffs' motions for modifications.

The January 4, 1985 order of the District Court is not yet reported and appears in Appendix A to this petition. The December 28, 1984 mandate of the Court of Appeals appears in Appendix B.

The judgment and opinion of the Court of Appeals, on remand from this Court for further consideration in light of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984), are not yet reported and appear respectively in Appendices C and D to this petition. The judgment and opinion of this Court, vacating the judgment of the Court of Appeals on the question of mootness and remanding for further consideration in light of *Stotts*, appears in Appendix E and is reported at 467 U.S. ____, 104 S.Ct. 3576 (1984).

The judgment and opinion of the Court of Appeals on the question of mootness appears in Appendix F to this petition and is reported at 716 F.2d 931 (1st Cir. 1983) ("*Beecher II*"). The opinion and judgment of this Court, vacating the original judgment of the Court of Appeals and remanding for consider-

ation of mootness, appears in Appendix G and is reported at 461 U.S. 920, 103 S.Ct. 2076 (1983). The original judgment of the Court of Appeals, affirming the memorandum order and opinion of the District Court appears in Appendix H and is reported at 679 F.2d 965 (1st Cir. 1982). The memorandum and order and opinion of the District Court appears in Appendix I and is reported at 522 F.Supp. 873 (D. Mass. 1981).

Jurisdiction.

The opinion and judgment of the United States Court of Appeals for the First Circuit (Appendices C and D, *infra*) were rendered on December 7, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

Constitutional Provision Involved.

CONSTITUTION OF THE UNITED STATES.

Amendment X.

The powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statement of the Case.

This litigation was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police

officers. Their claim was that because of racial discrimination in the recruitment and certification procedures utilized by the City of Boston and the Massachusetts Civil Service Commission, they were effectively denied employment as police officers. The case was tried before Wyzanski, J., who entered a judgment after which an appeal was taken to the First Circuit. The Court of Appeals filed an opinion giving directions for further proceedings.

On remand, the District Court approved and entered a consent decree. *Castro* v. *Beecher*, 365 F.Supp. 655 (D. Mass. 1973).

In 1975, plaintiffs brought an action pursuant tc the All Writs Act, 28 U.S.C. § 1651. That action was assigned to Chief Judge Caffrey, who has subsequently supervised all aspects of the case to date.

On July 7, 1975, the District Court approved a consent decree which was entered into by the parties as requested by the Court. That decree provided for the establishment of priority certification groups for police applications, for an affirmative action recruitment program for black and hispanic applications and for procedures for administration and reporting with respect to police entrance examinations.

The District Court entered a supplemental consent decree in July, 1976. Again, on July 1, 1979, the District Court approved and entered an agreement which provided for the continuing applicability of the method and ratios for certification provided for by the 1975 decree and for further recruitment activity and monitoring of the Civil Service examination.

As a result of the implementation of the District Court's remedial orders, the representation of minorities in the Boston Police Department increased from 2.3 percent in 1970 to 11.7 percent as of July 6, 1981.

Thereafter, on or about July 7, 1981, the Boston Police Department commenced a program of reductions in force of

uniformed officers due to a "lack of funds." The program was scheduled for completion on August 18, 1981. When completed, these reductions would have reduced minority representation in the police force to 6.2 percent.

On April 6, 1981 plaintiffs moved to modify prior orders of the District Court. Specifically, an order was sought preserving the current levels of minority officers in the Boston Police Department.

The Boston Police Patrolmen's Association was allowed to intervene as a defendant on April 27, 1981. On August 7, 1981, the District Court issued a memorandum order and opinion modifying its prior remedial decrees. 522 F.Supp. 873 (D. Mass. 1981).

The defendant intervenor filed a notice of appeal on or about August 19, 1981.

On May 11, 1982, the United States Court of Appeals for the First Circuit upheld the District Court's August 7, 1981 orders enjoining the Boston Police and Fire Departments from laying off policemen and firefighters in a manner that would reduce the percentage of minority officers below the level obtaining at the commencement of layoffs in July, 1981. 679 F.2d 965 (1982). These orders had the effect of partially superseding the operation of the state's statutory last-hired, first-fired scheme for civil service layoffs, Mass. G.L. c. 31, § 39.

Following the Court of Appeals' decision, Massachusetts enacted legislation providing the City of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons, and requiring the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. See 1982 Mass. Acts, c. 190, § 25. In light of these changed circumstances, this Court on May 16, 1983, vacated the judgment of the Court of Appeals and remanded for consideration of mootness in light of 1982 Mass. Acts, c. 190, § 25.

On August 31, 1983, the Court of Appeals, on remand from this Court, entered a judgment vacating the District Court's order of August 7, 1981, and remanding the causes to that court with directions to dismiss as moot the plaintiffs' original motion for modification.

Subsequently, on July 5, 1984, this Court again granted certiorari, vacated the August 31, 1983 judgment of the Court of Appeals, and remanded the case to the Court of Appeals for further consideration in light of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984).

On December 7, 1984, the Court of Appeals, on remand from this Court for further consideration in light of *Stotts*, entered a judgment and opinion reaffirming its prior decision vacating the District Court's order of August 7, 1981, and remanding the cases to that court with directions to dismiss as moot the plaintiff's original motion for modification.

Subsequently, on January 4, 1985, the District Court, in compliance with the mandate issued by the Court of Appeals on December 28, 1984, issued an order dismissing as moot the plaintiffs' motions for modifications.

Reasons for Granting the Writ.

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT THAT THE INSTANT CASES ARE MOOT IS NOT IN ACCORD WITH THIS COURT'S RECENT DECISION IN *Firefighter's Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.CT. 2576 (1984) AND THUS SHOULD NOT BE ALLOWED TO STAND.

In the recent case of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984), this Court ex-

pressly determined that a plaintiff or plaintiffs cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on other parties to the action. 104 S.Ct. at 2585. In its decision, this Court directed that the inquiry was not merely whether the modification of the consent decree was still in effect, but whether such mandated modification continued to have an impact on the parties such that the case remained alive. 104 S.Ct. at 2583. Stating that it was the plaintiffs' burden to convince the Court that the cases were moot, this Court concluded that the plaintiffs in *Stotts* had failed to satisfy such burden. 104 S.Ct. at 2583. In so concluding, this Court, in its decision, expressly cited its prior decision in *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

In *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), this Court expressly set forth the standard to be applied in determining whether a case or controversy has become moot. In its decision, the Court stated:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). We recognize that, as a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). But jurisdiction, properly acquired, may abate if the case becomes moot because
>
> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, see *id.*, at 633; see also *SEC* v. *Medical Committee For Human Rights*, 404 U.S. 403 (1972), and

(2) interim relief or events have completely and irrevocably eradicted the effects of the alleged violation. See *e.g., DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *Indiana Employment Security Div.* v. *Burney,* 409 U.S. 540 (1973).

When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

The burden of demonstrating mootness "is a heavy one." 440 U.S. at 631. (quoting *United States* v. *W.T. Grant Co., supra,* at 632-633).

In the instant case, as in *Stotts,* the plaintiffs have failed to satisfy that heavy burden. Plaintiffs have failed to show that both conditions are satisfied and that none of the parties to the instant action have a legally cognizable interest in the final determination of the underlying question of law (*i.e.,* whether the District Court exceeded its powers in entering a remedial order requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. See *Stotts,* 104 S.Ct. at 2585).

The instant case arises from a decision made in 1981 by the City of Boston to lay off hundreds of firefighters and police officers in order to avoid an alleged financial crisis. By statute, Massachusetts requires that civil service layoffs occur in the order of reverse seniority. Mass. G.L. c. 31, § 39. Many minority members of Boston's police and fire departments, however, had been hired only recently pursuant to consent decrees in which the City of Boston agreed to increase the proportion of minorities in the departments in order to remedy its past discriminatory hiring practices. As a result, layoffs

under that statutory last-hired, first-fired policy would have reduced significantly the minority representation in the two departments.

Because of these changed circumstances, plaintiffs thus sought an order from the United States District Court for the District of Massachusetts modifying the prior consent decrees. Plaintiffs claimed that application of the seniority statute to the City's reduction in force program would frustrate the purpose of the prior consent decrees. The relief requested by the plaintiffs, however, was not that the court merely enjoining the City from reducing the percentage of minority representation in the police and fire departments. Rather, plaintiffs requested that the court order an alternative method of conducting the layoffs — one which would allow the City to lay off senior non-minority firemen and police officers before junior minority firemen and police officers notwithstanding the state's last-hired, first-fired statute.

Plaintiffs' request for relief was not opposed by the City. such relief, if granted, would not only benefit the plaintiffs but the City as well. The City's primary interest was to lay off a massive number of firemen and police officers in order to avoid an alleged financial crisis. If the plaintiffs had merely requested that the City be enjoined from reducing the percentage of minority representation in the fire and police departments, the City, in effect, would have been precluded by federal court order from laying off junior minority members and would have been precluded by state law from laying off senior non-minority members. Thus, the City would either have had to employ another available means or method, other than police and fire layoffs, to meet its alleged financial crisis or suffer the consequences of violating state or federal law. By requesting, however, that the City be permitted to circumvent state law, the plaintiffs provided a way for the City to implement its massive layoff program without federal or state repercussions — albeit at the expense of senior non-minority

rather than junior minority firemen and police officers. Thus, the relief requested by the plaintiffs did not adversely affect, but rather benefited, the interests of the City.

Such requested relief did, however, adversely affect the interests of senior non-minority members of the City's police and fire departments. Moreover, such relief, if granted, would have the effect of superseding the operation of the state's statutory seniority scheme for civil service layoffs. Thus, the plaintiffs' claim for relief was opposed by the state civil service officials and the intervening police and fire unions. The opposing parties contended that the relief requested by the plaintiffs, if granted, would constitute an impermissible and unjustified intrusion by the federal court upon a valid state seniority statute. The opposing parties, therefore, requested that the court deny the plaintiff's claim for relief.

The case or controversy presented before the Federal District Court was, thus, whether the court had the power or authority to supersede the state's statutory seniority system and grant the plaintiffs the relief they requested. The District Court decided that it had such power and the United States Court of Appeals for the First Circuit affirmed. After the Court of Appeals' decision, however, Massachusetts enacted legislation providing the City of Boston with new revenues, requiring it to reinstate all police officers and firemen laid off during the City's alleged fiscal crisis, and securing those persons against future layoffs for fiscal reasons. 1982 Mass. Acts, c. 190, § 25 (hereinafter referred to as the Tregor Act).

The relief provided by the Tregor Act, however, did not completely and irrevocably eradicate the effects of the Federal District Court's alleged unlawful preemption of the state's statutory seniority system. The Tregor Act merely provided reinstatement of those firemen and police officers who were laid off by the City in accordance with the Federal District Court's orders. The Tregor Act did not provide any relief of compensation to those persons for the time period during which

they had been unlawfully laid off. Similar to this Court's reasoning in *Stotts*. those employees, although restored to their former position, have not been made whole. 104 S.Ct. at 2584.

Moreover, it cannot be said with assurance that there is no reasonable expectation that the alleged violation will recur. Although the Tregor Act required the City to reinstate those officers who had been laid off in 1981 and prohibited the City from laying off those officers in the future for lack of funds, the Act only provided employment security until June 30, 1983, for those officers who had not been laid off in 1981. Thus, after June 30, 1983, the City was and is currently free to return to its old ways and in the event of such future layoffs, it is not unreasonable to expect that without a dispositive ruling by this Court on the legality of the Federal District Court's prior remedial orders, the Federal District Court will again unlawfully suspend state law and that senior non-minority officers will again be unlawfully subjected to loss of employment and pay.

Thus, in the instant case, neither of the two conditions for mootness set forth by this Court in *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979), and implicitly reaffirmed by the Court in *Stotts,* have been satisfied. The relief provided by the Tregor Act has not completely and irrevocably eradicated the effects of the Federal District Court's unlawful usurption of power and it cannot be said with assurance that there is no reasonable expectation that the alleged violation will recur.

The plaintiffs profess, however, that they no longer have a personal stake in the proceeding. The fact that the plaintiffs were granted the relief they requested, however, does not moot the controversy. As this Court, in *Stotts,* stated:

> Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review

> by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action.

104 S.Ct. at 2585.

Moreover, as this Court stated in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968):

> This conclusion — that the question is not moot and ought to be adjudicated by this Court — is particularly appropriate in view of this Court's decision in *Walker* v. *Birmingham*, 388 U.S. 307 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity. Petitioners have here pursued the course indicated by *Walker*; and in view of the continuing vitality of petitioners' grievance, we cannot say that their case is moot.

The state officials and unions involved in the instant case have similarly pursued the course indicated by *Walker*. Despite their doubts as to the validity of the Federal District Court's intrusion on the state statutory seniority system, the state officials obeyed the court's orders and sought judicial review. In view of the adverse effect which such orders had, and continue to have on those persons whom the state law was designed to protect, the state officials and unions have a genuine public

interest in having the legality of the Federal Court's action settled. This is especially true since it appears that the legality or illegality of the Federal Court's action will play a substantial role in the City and state officials' response as to whether those persons laid off in violation of the state's seniority statute are entitled to back pay and damages. See *e.g., Stotts,* 104 S.Ct. at 2584. (If the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to back pay and seniority.)

Finally, with respect to the issues of back pay and loss of competitive seniority, this Court in *Stotts* expressly took the view that although not much money and seniority were involved in that case, such issues constituted matters of substance and enough so to foreclose any claim of mootness. 104 S.Ct. at 2584. Thus, the similar issues of back pay and making the affected employees whole in the instant case similarly constitute matters of substance and foreclose any determination of mootness.

For the reasons stated above, it is clear that, particularly in light of this Court's recent discussion of mootness in *Stotts,* the decision of the Court of Appeals that the instant cases are moot should not be allowed to stand.

II. The Four Considerations Relied Upon by the Court of Appeals in Its Decision Below do Not Significantly Distinguish the Instant Case From *Stotts* So as to Persuade a Contrary Result.

In its decision below, the Court of Appeals expressly recognized that *Stotts* involved a factually similar case to the instant one and that this Court, in *Stotts,* had expressly ruled that a state law similar to the Tregor Act did not render the case moot (Appendix D, page 7a). Despite this Court's decision in

Stotts however, the Court of Appeals reaffirmed its prior decision in *Beecher II*, vacating the instant case as moot, on the grounds that the instant case, in its view, differed from *Stotts* in several important ways (Appendix D, page 8a). As set forth below, the petitioner contends that the four considerations relied upon by the Court of Appeals in its decision below do not significantly distinguish the instant case from *Stotts* and thus do not "persuade" a contrary result.

The first consideration relied upon by the Court of Appeals was that the Tregor-like state law in *Stotts* did not provide retroactive competitive similarity for those who had been laid off. Thus, the Court of Appeals distinguished *Stotts* from the instant case on the basis that *Stotts* involved not only a back-pay controversy, but a seniority problem as well. The petitioner contends however, that the fact that *Stotts* involved two adverse effects (*i.e.*, loss of back pay and competitive seniority) whereas only one of the adverse effects resulting from the district court's alleged unlawful modification continues to have an impact in the instant case (*i.e.*, loss of back pay), does not significantly distinguish *Stotts* from the instant case so as to warrant a contrary result.

The second consideration relied upon by the Court of Appeals is similarly unpersuasive. In its decision, the court set forth such second consideration as follows:

> Second, the layoffs here, like those in *Stotts*, have created a back pay controversy. But, as we explained in *Beecher II*, this federal appeal is only indirectly related to that controversy, which is currently the subject of state proceedings. Unlike *Stotts*, an important party to that controversy, the City, is not a real party before us. Since no party before us has any financial stake in denying the laid-off employees back pay, it is difficult to see how this matter can create a controversy between them.

(Appendix D, Page 8a.)

Contrary to the view taken by the Court of Appeals above, it was not the layoffs, as initially proposed in accordance with the state's seniority statute, which created the back pay controversy in the instant case or in *Stotts*, but rather the layoffs carried out in accordance with the alleged unlawful orders of the federal district court. As in *Stotts*, the back pay controversy in the instant case is a direct result of the federal district court's unlawful modification of a prior consent decree. Thus, contrary to the view taken by the Court of Appeals, this federal appeal is directly related to that controversy.

Nor does it suffice for the Court of Appeals to say that the City is not a "real" party in the instant case. Such statement totally ignores the position and action taken by the City throughout these proceedings.

As set forth in this petition, *infra*, pp. 8-10, the instant case arises from a decision made in 1981 by the City to lay off hundreds of firefighters and police officers in order to avoid an alleged financial crisis. By statute, Massachusetts requires that civil service layoffs occur in the order of reverse seniority. Mass. G.L. c. 31, § 39. Many minority members of the City's police and fire departments, however, had been hired only recently pursuant to consent decrees in which the City agreed to increase the proportion of minorities in the departments in order to remedy its past discriminatory hiring practices. As a result, layoffs under that statutory last-hired, first-fired policy would have reduced significantly the minority representation in the two departments.

Because of these changed circumstances, plaintiffs thus sought to invoke the jurisdiction of the federal district court to obtain a favorable modification of the prior consent decrees. Plaintiffs claimed that application of the seniority statute to the City's reduction in force program would frustrate the purpose of the prior consent decrees. The modification by the plaintiffs, however, was not that the court merely enjoin the

City from reducing the percentage of minority representation in the police and fire departments. Rather, plaintiffs requested that the court order an alternative method of conducting the layoffs — one which would allow the City to lay off senior non-minority firemen and police officers before junior minority firemen and police officers notwithstanding the state's last-hired, first-fired statute.

Plaintiffs' request for such modification was not opposed by the City. Such modification, if granted, would not only be favorable to the plaintiffs but the City as well. The City's primary interest was to lay off a massive number of firemen and police officers in order to avoid an alleged financial crisis. If the plaintiffs had merely requested that the City be enjoined from reducing the percentage of minority representation in the fire and police departments, the City, in effect, would have been precluded by federal court order from laying off junior minority members and would have been precluded by state law from laying off senior non-minority members. Thus, the City would either have had to employ another available means or method, other than police and fire layoffs, to meet its alleged financial crisis or suffer the consequences of violating state or federal law. By requesting, however, that the City be permitted to circumvent state law, the plaintiffs provided a way for the City to implement its massive layoff program without federal or state repercussions — albeit at the expense of senior non-minority rather than junior minority firemen and police officers. Thus, the modification requested by the plaintiffs did not adversely affect, but rather benefited, the interest of the City.

Such requested modification did, however, adversely affect the interests of senior non-minority members of the City's police and fire departments. Moreover, such modification, if granted, would have the effect of superseding the operation of the state's statutory seniority scheme for civil service layoffs. Thus, the requested modification was opposed by the state civil

service officials and the intervening police and fire unions. The opposing parties contended that the modification, if granted, would constitute an impermissible and unjustified intrusion by the federal court upon a valid state seniority statute. The opposing parties therefore requested that the court deny such modification.

From the above, it is clear that the City is a "real" party in the instant case. Moreover, it is clear that the City has a large financial stake in denying the laid-off employees back pay. It was precisely for the very purpose of insulating itself from such liability that the City did not oppose the unlawful modification requested by the plaintiffs. By consenting to the granting of such relief, the City, together with the plaintiffs, effectively invoked the jurisdiction of the federal court to obtain a modification favorable to both of them, but adversely affecting other parties to the action. Although the plaintiffs are now attempting to insulate that ruling from appellate review by claiming that they are no longer interested in the matter, the City, by contrast, has taken a very low profile on appeal. This is not surprising since it is extremely difficult to imagine how the City could claim that it is no longer interested in the matter or that no controversy still exists. The fact, however, that the City, for whatever reason, deliberately chose not to file a brief or argue the instant case on appeal, does not mean that the City is no longer a party. The City has never been dismissed, or even sought to be dismissed, as a party to the instant case. In fact, on remand from this Court for further consideration in light of *Stotts*, corporation counsel for the City filed a motion in the Court of Appeals ostensibly requesting that petitioner-intervener not be allowed oral argument to the Appeals Court on remand (said motion appears in Appendix L to this petition). The mere filing of this motion clearly shows that the City is still interested in the matter. Thus, the City remains a "real" party in the instant case, albeit a silent one on appeal which,

unlike *Stotts*, assented to the plaintiffs' demands below in an attempt to confer jurisdiction on the federal court and insulate itself from liability. The fact that the instant case differs from *Stotts* in this respect, however does not warrant a contrary result since the City, by its assent in the instant case, could not confer any greater jurisdiction on the federal court.

The third consideration set forth by the Court of Appeals in its decision (*i.e.*, that the order of the district court has been vacated) similarly does not warrant a result contrary to *Stotts*. In *Stotts*, this Court directed that the inquiry was not merely whether the modification of the consent decree was still in effect, but whether such mandated modification continued to have an impact on the parties such that the case remained alive. 104 S.Ct. at 2583. As set forth *infra* in this petition, there is no question that the modification in the instant case continues to have an impact on the parties. Contrary to the statement made by the Court of Appeals, to accept petitioner's argument would not mean "resurrecting a dead order solely for the purpose of then striking it down on the merits," but rather would mean correcting an erroneous and unjust order which continues to have adverse effects on innocent parties who obeyed such order and sought judicial review.

Finally, the fourth consideration relied upon by the Court of Appeals (*i.e.*, that there is no longer any controversy about the merits) is itself without merit. In *Stotts*, this Court expressly determined that a party or parties cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on other parties to the action. 104 S.Ct. at 2585. Thus, the plaintiffs' claim in the instant case that they are no longer interested in the matter does not insulate the instant case from appellate review.

Moreover, as set forth *supra* in this petition, it was not only the plaintiffs in the instant case who invoked the jurisdiction of the federal court to obtain a favorable modification of the consent decrees, but the City as well. By assenting to the federal court's granting of the relief requested by the plaintiffs, the City also sought to invoke the jurisdiction of the federal court to obtain a favorable modification of the consent decrees — a federal court order which not only insulated the minority officers from layoff, but which insulated the City from liability for violating the state's seniority statute. Unlike the plaintiffs in the instant case however, the City does not now claim on appeal that it is no longer interested in the matter or that the federal court's action below was erroneous. Rather, the City, throughout these appellate proceedings, has chosen to remain silent, even though, in related proceedings before the State Civil Service Commission, the City continues to rely on the validity of such federal orders to "justify" its layoff of the non-minority officers in violation of the state's seniority statute. This Court, however, should not allow the City's silence on appeal in the instant case to compel or "persuade" a result contrary to *Stotts*. As in *Stotts*, the City in the instant case would be similarly free to take a wholly different position with respect to back pay if the district court's orders are reversed. See *Stotts*, 104 S.Ct. at 2584. (If the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to backpay and seniority.)

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANK J. McGEE,*
STEVEN M. GUINEY,
McGEE & PHILLIPS,
1952 Ocean Street,
Marshfield, Massachusetts 02050.
(617) 834-4690

**Counsel of Record*

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Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PEDRO CASTRO, ET AL,
Plaintiff,

v. CIVIL ACTION NOS. 70-1220-C
NANCY B. BEECHER, ET AL, 74-2982-C
Defendants.

BOSTON CHAPTER, NAACP, ET AL,
Plaintiffs,

v. CIVIL ACTION NO. 72-3060-C

NANCY B. BEECHER, ET AL,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v. CIVIL ACTION NO. 73-269-C

CITY OF BOSTON, ET AL,
Defendants.

ORDER
January 4, 1985

CAFFREY, CH. J.

In compliance with the mandate of the United States Court of Appeals for the First Circuit issued December 28, 1984, it is ORDERED:

The motions for modification filed in the above-captioned cases are dismissed as moot.

/s/_____
Andrew A. Caffrey, Ch.J.

Appendix B.

CLERK'S OFFICE
U. S. COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1642, 81-1650, 81-1651 and 81-1656

(*Date*) Dec. 28, 1984

Mandate herein issued today.

Francis P. Scigliano, Clerk

Appendix C.

United States Court of Appeals For the First Circuit

No. 81-1642.

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,

v.

NANCY B. BEECHER, ET AL.,
Defendants, Appellees

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Intervenor, Appellant

No. 81-1650.

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees

v.

NANCY BEECHER, ET AL.,
Defendants, Appellees,

BOSTON POLICE PATROLMEN'S
ASSOCIATION, INC.,
Intervenor, Appellant

No. 81-1651.

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees

v.

NANCY BEECHER, ET AL.,
Defendants, Appellants

No. 81-1656.

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,
v.
NANCY B. BEECHER, ET AL.,
Defendants, Appellees

CIVIL SERVICE COMMISSION, ET AL.,
Defendants, Appellants

JUDGMENT
Entered: December 7, 1984

These causes came on to be heard on remand from the Supreme Court of the United States, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Supreme Court of the United States having vacated the judgment of this Court in the above causes and remanded the causes for further consideration in conformity with the opinion of that Court,

It is ordered that the Listrict Court's orders of August 7, 1981 are vacated and the causes are remanded to that Court with directions to dismiss as moot the motions for modification consistent with the opinion filed this day.

No Costs.

By the Court:
Francis P. Scigliano
Clerk

[cc: Messrs. Barnico, McMahon, McGee, and Dittmar]

Appendix D.

United States Court of Appeals For the First Circuit

No. 81-1642.

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,

v.

NANCY B. BEECHER, ET AL.,
Defendants, Appellees.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Intervenor, Appellant.

No. 81-1650.

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees,

v.

NANCY BEECHER, ET AL.,
Defendants, Appellees,

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Intervenor, Appellant.

No. 81-1651.

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees,

v.

NANCY BEECHER, ET AL.,
Defendants, Appellants.

No. 81-1656.

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,
v.
NANCY B. BEECHER, ET AL.,
Defendants, Appellees.

CIVIL SERVICE COMMISSION, ET AL.,
Defendants, Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before
Campbell, *Chief Judge*,
Bownes and Breyer, *Circuit Judges*.

Thomas A. Barnico, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief for Commonwealth of Massachusetts.

John F. McMahon with whom *E. David Wanger* and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief for Boston Firefighters Union, Local 718.

Frank J. McGee with whom *Steven M. Guiney* and *McGee & Phillips* were on brief for Boston Police Patrolmen's Association, Inc.

James S. Dittmar with whom *Barbara R. Arnwine, Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, Richard R. Lavin, Matthew D. Baxter* and *Widett, Slater & Goldman* were on brief for plaintiffs, appellees.

December 7, 1984

Per Curiam. In *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982) ("*Beecher I*"), this court affirmed a district court order modifying Boston police and fire department seniority rules, so as to prevent the departments from laying off too many minority officers. The parties sought Supreme Court review. The Supreme Court remanded the case to us for reconsideration in light of a later-enacted state law, the Tregor Act, 1982 Mass. Acts ch. 190, § 25, which removed the imminent threat of layoffs, reinstated all officers laid off, and provided them with retroactive competitive seniority. Upon reconsideration, we found that the Tregor Act ended the controversy between the parties and rendered the case moot. We ordered the district court's injunction vacated. *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (1st Cir. 1983) ("*Beecher II*"). The parties again sought Supreme Court review.

While the petition for certiorari in *Beecher II* was pending, the Supreme Court decided a factually similar case, *Firefighters Local Union No. 1784* v. *Stotts*, 52 U.S.L.W. 4767 (U.S. June 12, 1984). In *Stotts*, the Supreme Court examined a "seniority/racial minority layoff" problem much like the one at issue in *Beecher II*. It ruled that a state law similar to the Tregor Act did not render the controversy moot; and on the merits, it held a similar district court injunction unlawful. The Supreme Court has now remanded the case to us again and asked us to reexamine our "mootness" holding in light of *Stotts*. *Boston Firefighters Local 718* v. *Boston Chapter, NAACP*, 52 U.S.L.W. 3934 (U.S. July 5, 1984).

Having reconsidered the case before us, we find that it differs from *Stotts*, in respect to mootness, in several important ways. First, the Tregor-like state law in *Stotts* did not provide retroactive competitive seniority for those who had been laid off. The parties in that case disagreed about seniority and believed the lawfulness of the district court's injunction determinative. Here, the parties agree that there is no seniority problem or issue.

Second, the layoffs here, like those in *Stotts*, have created a back pay controversy. But, as we explained in *Beecher II*, this federal appeal is only indirectly related to that controversy, which is currently the subject of state proceedings. Unlike *Stotts*, an important party to that controversy, the City, is not a real party before us. Since no party before us has any financial stake in denying the laid-off employees back pay, it is difficult to see how this matter can create a controversy between them.

Third, the Supreme Court in *Stotts* specifically noted that the district court injunction "was affirmed by the Court of Appeals and has never been vacated." 52 U.S.L.W. at 4769. Here, to the contrary, we have already ordered the district court order vacated, 716 F.2d at 933; *see United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). To accept appellants' argument would mean resurrecting a dead order solely for the purpose of then striking it down on the merits.

Fourth, there is no longer any controversy about the merits. The NAACP has stipulated that, should we reach the merits, we should enter a

> judgment summarily reversing the district court's August 7, 1981 orders and remanding with instructions to dismiss the motions for modification with prejudice.

In *Stotts*, by contrast, the parties vigorously disputed the underlying merits — a dispute fueled by their adverse interests on the competitive seniority issue.

At oral argument, the NAACP's counsel stated that he was arguing for "mootness" because he believed it the legally correct approach, not because it made a significant difference to his clients. We agree with counsel. The four sets of considerations we have mentioned, viewed in light of Article III's constitutional limitation of this court's power to actual "cases" or "controversies," persuade us that a dismissal on grounds of mootness is legally correct. We therefore reaffirm *Beecher II*, which vacated the district court's August 7, 1981 orders on those grounds.

Appendix E.

SUPREME COURT OF THE UNITED STATES

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

83-866

v.

BOSTON CHAPTER, N. A. A. C. P., INC., ET AL.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

83-885

v.

PEDRO CASTRO ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 83-866 AND 83-885. Decided July 5, 1984

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ___ (1984). JUSTICE MARSHALL took no part in the consideration or decision of these cases.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The Court today logically applies yesterday's illogic. I cannot disagree with the Court's conclusion that the mootness issue in these cases is similar to some portions of the mootness

issue in *Firefighters* v. *Stotts*, ___ U.S ___ (1984). I therefore do not dispute that there is reason to think that the decision in *Stotts* bears on the Court of Appeal's conclusion that these cases are moot. In my view, however, the portions of *Stotts* relevant to the mootness issue in this case are demonstrably wrong; they depart sharply from our precedents and ignore the jurisdictional limits imposed by the "case or controversy" requirements of Article III of the Constitution. The sooner they are forgotten, the earlier that the longstanding principles governing mootness doctrine can be resurrected. The Court of Appeals disposed of these cases in accordance with those principles, and I would let its ruling stand.

I

The controversy in these cases has remarkable similarity to the controversy in *Stotts*. It began when the city of Boston announced a plan to conduct a reduction in force as a response to its fiscal difficulties. The proposed reductions included layoffs in the police and fire departments, both of which were operating under consent decrees to remedy past discrimination. Those decrees required the departments to engage in preferential hiring of members of minority groups in order to raise the representation of minorities in the departments to the level in the surrounding workforce. The proposed layoffs were to be conducted on a "last-hired, first-fired" basis, and would have affected many minority persons hired under the consent decree.

Minority officers brought suit in federal court to enjoin the layoffs, and the court concluded that seniority-based layoffs would impede its efforts to remedy the past discrimination. Accordingly, the District Court enjoined the police and fire departments from conducting layoffs in a manner that would reduce the percentage of minorities employed in those departments. *Castro* v. *Beecher*, 522 F. Supp. 873 (Mass. 1981). As

a consequence, some nonminority employees were laid off ahead of minorities with less seniority. The State Civil Service Commission and the unions representing affected nonminority persons challenged the orders of the District Court. The Court of Appeals, however, affirmed. *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965 (CA1 1982).

Following the Court of Appeals' decision and this Court's grant of certiorari to review it, ___ U.S. ___ (1982), the Massachusetts Legislature enacted the Tregor Act to address the situation. 1982 Mass. Acts, ch. 190. That legislation provided the city of Boston with new revenues, required reinstatement of all police and firefighters laid off during the reductions in force, secured those personnel against future layoffs for fiscal reasons, and required the maintenance of minimum-staffing levels in the police and fire departments through June 30, 1983. This legislative action terminated all layoffs, and greatly diminished the risk that future layoffs might take place. Respondents argued before this Court that the legislation rendered the controversy in these cases moot, and deprived the Court of jurisdiction to decide them. Because the legislation's effects raised serious questions concerning this Court's jurisdiction, we vacated the Court of Appeals' judgment and remanded the case for consideration of mootness in light of the Tregor Act. ___ U.S. ___ (1983).

On remand, the Court of Appeals held that the Tregor Act's mandatory reinstatement of all laid-off police and firefighters, and its requirement of minimum-staffing levels, removed the legally cognizable stake that the litigants had in the suits before the layoffs ended. *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (CA1 1983). the court also rejected the claim that the controversy presented by the case was "capable of repetition yet evading review." If future layoffs occurred despite the Tregor Act, the court explained, there was no reason to assume that the state legislature would once again intervene before

resolution by this Court. Finally, the court rejected the claim that these cases remain live because the District Court order interferes with backpay claims filed with the State Civil Service Commission by the affected nonminority workers. The Court of Appeals explained that those issues properly were to be resolved in the administrative proceedings before the Commission.

II

Because the Tregor Act is a Massachusetts statute, and *Stotts* involved layoffs in Tennessee, this Court's decision in *Stotts* obviously sheds no light on whether the Court of Appeals properly assessed the Tregor Act's effect on the likelihood that future layoffs will occur in the Boston police and fire departments. This Court's decision in *Stotts* bears only on the question whether the backpay claims of individuals affected by the Boston layoffs create a controversy sufficient to provide a federal court with jurisdiction over these cases. The nature of those claims and the most basic principles of Article III make clear that they do not.

The elements of Article III's "case or controversy" requirement are well established. Among them is the requirement that parties before the Court have legally cognizable interests that are adverse to each other. Such adversity of interests must exist "at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). In addition, a complaining party must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). A ruling that does not provide any relief to the prevailing party ignores the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or

abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Oil Workers* v. *Missouri*, 361 U.S. 363, 367 (1960), quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895).

When a case becomes moot while pending review, it is the "duty of the appellate court" to vacate the judgment below and remand with directions to dismiss. *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936). "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). This disposition serves the purpose of preserving the rights of all parties to the controversy in any future litigation that might arise presenting similar issues.

Application of these principles makes it readily apparent that backpay claims filed against the city do not keep these case alive and that the Court of Appeals correctly found them to be moot. First, claims for backpay simply are not a part of these cases. Petitioners do not seek backpay in them, and a decision of these cases will not provide backpay to anyone. It may be true, as the parties concede, that backpay claims are being litigated, or already have been decided, in administrative proceedings before the State Civil Service Commission. But the status of any such litigation is irrelevant here, for it has always been the rule that a case is not kept alive because of issues that might arise in other proceedings in another forum. A federal court's jurisdiction is determined by the conditions of the case before it. *Oil Workers* v. *Missouri*, 361 U.S., at 370 ("Our power only extends over and is limited by the conditions of the case now before us," quoting *American Book Co.* v. *Kansas*, 193 U.S. 49, 57 (1904)). Because backpay is not an issue in these cases, it cannot provide a jurisdictional basis for these suits.

Second, it is apparent that the minority officers have no stake in the resolution of backpay claims of others filed with the State Civil Service Commission. If backpay is awarded, it will come from the city, not from the minority officers, who are not parties to those proceedings, and who have no interest in whether such backpay is awarded. The possible dispute over backpay therefore does not create a controversy with respect to the minority officers who are respondents in these cases.

The Court of Appeals based its conclusion that these cases are moot on precisely these considerations. In rejecting the claim that backpay issues keep these cases live, the court explained:

> "According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. . . . Thus even assuming . . . that the district court's order directly inhibits the state Civil Service Commission respecting the backpay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now — rendered in the absence of a present case or controversy in this proceeding — would amount to no more than advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. . . . [Petitioners'] interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. . . . Plaintiffs now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without

an advisory resolution of the constitutional issue by the federal courts." 716 F.2d, at 933 (citations omitted).

Nothing in this Court's opinion in *Stotts* explains why these principles are not fully applicable here. It is true that *Stotts* involved ancillary backpay issues somewhat similar to those in these cases, but the Court's opinion never explained why vacating the District Court's orders would not have cleared the path for full litigation of the backpay issues in an appropriate proceeding involving adverse parties. Instead, this Court's opinion in *Stotts* proceeded from the misconception that even if the District Court's orders in those cases were vacated, they still might control backpay claims. ___ U.S., at ___ (slip op. 8). Because a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation, the portion of the Court's decision in *Stotts* that assumes the contrary is tautologically incorrect.

In addition to being controlled by longstanding principles of Article III, these cases attest to the underlying wisdom of those tenets. Petitioners do not suggest that they are entitled to backpay under Title VII of the Civil Rights Act of 1964. Any backpay claims that may have arisen as a result of the Boston layoffs presumably are controlled by state rather than federal law. We cannot claim familiarity with the standards governing such claims, and hence we are in no position to determine how the federal questions formerly presented by these cases are relevant to the claims for backpay under state law. It seems likely, however, that the issue raised in the civil service proceedings is whether the layoffs of the nonminority persons were "justified" under state law. See Mass. Gen. Laws Ann., ch. 31, § 43 (West) (Supp. 1984-1985). To the extent that application of this standard might involve consideration of whether the layoffs were pursuant to a federal court order,

further review of these cases would shed no new light on that question. There is no dispute over whether the layoffs were conducted pursuant to outstanding federal court orders that were validly entered and that the city had a legal duty to obey. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 314 (1967) (court order entered by court with subject matter and personal jurisdiction over case gives rise to a plain duty to obey until order is stayed, vacated, or reversed). If the fire and police departments can defend back pay claims on the ground that the layoff of nonminority persons was justified because of the city's duty to obey a federal court injunction, that defense presumably would exist regardless of whether the injunction is overturned on appeal. In any event, it is precisely because the issue of backpay is not being litigated in these cases, and hence the relevance of the District Court's injunction is unclear, that it is improper for a federal court to use those claims as a basis for its jurisdiction over these cases. If resolution of back-pay claims under state law ultimately does involve a federal question, that question would be reviewable when presented as part of a decision resolving the backpay claims.

The Court's treatment of these cases is especially incongruous given that just last Term the Court implicitly rejected the view that backpay claims kept these cases live. When this Court vacated the judgment in these cases and remanded them to the Court of Appeals, the Court expressly based its decision on the possibility that the Tregor Act rendered the cases moot. ___ U.S., at ___. That Act affected only the prospective aspects of the layoffs; it ordered reinstatement of laid-off employees and protected them from similar layoffs in the future. There was no suggestion, either then or now, that the Tregor Act had any effect whatsoever on backpay claims stemming from layoffs in the past. Thus, the backpay claims that petitioners now assert as keeping these cases alive were in the same posture last Term. Had this Court then believed that backpay

issues created a controversy in these cases, there would have been no reason to remand them to the Court of Appeals for consideration of the Tregor Act. By remanding the cases, this Court implicitly expressed its view that the backpay claims did not save the cases from being moot. The Court offers no explanation for taking a contrary position now.

III

Because the Court of Appeals properly stayed within the scope of its Article III powers, I would simply deny the petitions for certiorari in these cases. If the Court believes that the Court of Appeals improperly applied the principles of Article III, the Court has a duty to explain why. It is incongruous for the Court simply to remand for further consideration of the mootness issue "in light of" *Stotts*, because the Court's opinion in *Stotts* ignored the principles that the Court of Appeals relied upon here. Rather than shedding any light on the mootness issue in these cases, *Stotts* casts a murky shadow over well-established Article III principles.

Appendix F.

United States Court of Appeals for the First Circuit.

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
INTERVENOR, APPELLANT.

No. 81-1650

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR, APPELLANT.

No. 81-1651

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLANTS.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.
NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

CIVIL SERVICE COMMISSION, ET AL.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez,* *District Judge*.

Thomas A. Barnico, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, *E. Michael Sloman*, Assistant Attorney General, and *Marc S. Seigle*, Special Assistant Attorney General, were on brief, for Commonwealth of Massachusetts.

John F. McMahon, with whom *E. David Wanger*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Boston Firefighters Union, Local 718.

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* Of the District of Puerto Rico, sitting by designation.

Frank J. McGee, with whom *Law Office of Frank J. McGee* was on brief, for Boston Police Patrolmen's Association, Inc.

James S. Dittmar, with whom *Peggy A. Wiesenberg*, *Richard R. Lavin*, *Matthew D. Baxter* and *Widett, Slater & Goldman* were on brief, for plaintiffs, appellees.

August 31, 1983

PER CURIAM. This case is before the court on remand from the Supreme Court for consideration of mootness. The facts and prior proceedings are fully traced in this court's previous opinion, *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982). Since 1975, the Boston police and fire departments have been subject to consent decrees requiring preferential hiring of minorities to relieve the effects of prior discrimination. In 1981, facing proposed fiscal layoffs which would substantially vitiate any progress made under the decrees, plaintiffs sought and obtained modification of the original decrees. *Castro* v. *Beecher*, 522 F. Supp. 873 (D. Mass. 1981). The modifying order prohibited both Boston departments from reducing minority percentages in their workforces, with the practical result that non-minority firemen and police officers would have to be laid off before junion [*sic*] minority firemen and police officers notwithstanding the state's last-hired, first-fired statute.

The modification was affirmed on appeal to this court in the above-cited case, and defendants obtained certiorari from the Supreme Court. Meanwhile, however, Massachusetts enacted the so-called Tregor Act mandating reinstatement of all police and firefighters laid off during the reduction in force. *See* 1982 Mass. Acts, c. 190, § 25. The Supreme Court therefore

vacated this court's judgment and remanded for consideration of mootness.

"The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review . . . ." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Golden* v. *Zwickler*, 394 U.S. 103 (1969). When, as here, intervening acts destroy the interest of a party to the adjudication, the case is mooted, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). The Tregor Act's mandatory reinstatement of the laid off police and firefighters and its requirement of minimum staffing levels through June 30, 1983 removed plaintiffs' stake in the proceeding which they had instituted in 1981 at a time when layoffs were taking place.

This is not an example of the "voluntary cessation of allegedly illegal conduct" which does not render a case moot. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Rather the city of Boston has acted pursuant to a supervening state statute. Furthermore, the case does not present a question "capable of [*sic*] repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). Future layoffs might occur, but there is no reason to assume that a similar state enactment would once again render the case moot before resolution by the Supreme Court.[1]

Appellants' contention that the case remains alive because the modifying order prohibits the adjudication of state Civil Service Commission claims for back pay is not persuasive. According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus even assuming, which we do not decide, that the

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[1] The Supreme Court has granted certiorari on a case presenting the same issue as the case before us. *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3871 (June 6, 1983) (No. 82-229). Thus that question may be resolved within the near future.

district court's order directly inhibits the state Civil Service Commission respecting the back pay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now — rendered in the absence of a present case or controversy in this proceeding — would amount to no more than an advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. *See, e.g., North Carolina* v. *Rice*, 404 U.S. 244 (1971); *St. Pierre* v. *United States*, 319 U.S. 41 (1942). Appellants' interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980). Plaintiffs now lack the "personal stake" necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without an advisory resolution of the constitutional issue by the federal courts.

Accordingly, we vacate the district court's order of August 7, 1981 and remand to the district court to dismiss as moot the motion for modification, without prejudice to further actions under the district court's continuing jurisdiction to monitor the original consent decrees. *Crowell* v. *Mader*, 444 U.S. 505, 506 (1980); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972); *Romero-Barcelo* v. *Brown*, 643 F.2d 835, 862 (1st Cir. 1981).

Vacated and Remanded.

Appendix G.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Supreme Court of the United States

Nos. 82-185, 82-246 AND 82-259

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

82-185 *v.*

BOSTON CHAPTER, NAACP, ET AL.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

82-246 *v.*

PEDRO CASTRO ET AL.

NANCY B. BEECHER, ET AL., PETITIONERS

82-259 *v.*

BOSTON CHAPTER, NAACP, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[MAY 16, 1983]

PER CURIAM.

In these cases, the United States Court of Appeals for the First Circuit upheld the District Court's August 7, 1981 orders

enjoining the Boston Police and Fire Departments from laying off policemen and firefighters in a manner that would reduce the percentage of minority officers below the level obtaining at the commencement of layoffs in July, 1981. 679 F.2d 965 (1982). These orders had the effect of partially superseding the operation of the state's statutory last-hired, first-fired scheme for civil service layoffs, Mass. Gen. Laws Ann. ch. 31, § 39. Following the Court of Appeals' decision, Massachusetts enacted legislation providing the City of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons, and requiring the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. See 1982 Mass. Acts, c. 190, § 25. In light of these changed circumstances, we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts, c. 190, § 25.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of these cases.

Appendix H.

United States Court of Appeals for the First Circuit

Nos. 81-1642
81-1656
81-1650
81-1651

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS-APPELLEES,
v.
NANCY B. BEECHER, ET AL.,
DEFENDANTS-APPELLANTS,
and
BOSTON FIREFIGHTERS UNION, LOCAL 718
INTERVENOR-APPELLANT.

PEDRO CASTRO, ET AL.,
PLAINTIFFS-APPELLEES,
v.
NANCY BEECHER, ET AL.,
DEFENDANTS-APPELLANTS,
and
BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]
(522 F. Supp. 873)

Before
CAMPBELL, BOWNES and BREYER,
Circuit Judges.

E. David Wanger, with whom *John F. McMahon*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Intervenor, Appellant Local 718 in Case No. 81-1642.

Frank J. McGee, on brief for Intervenor-Appellant Boston Police Patrolmen's Association, Inc.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1651.

Marc S. Seigle, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1656.

James S. Dittmar, with whom *Berman, Dittmar & Engel, P.C.*, *Judith Bernstein Tracy*, and *Peggy A. Wiesenberg* were on brief, for plaintiffs-appellees.

May 11, 1982

BOWNES, *Circuit Judge.* This case arises from a conflict between a statutorily established seniority system mandating layoffs on a last hired, first fired basis and court orders insulating a percentage of minorities from such a system. Shortly after the July 1981 beginning of fiscal 1982, the Police and Fire Department of the City of Boston embarked upon a program of massive reductions in force, allegedly precipitated by budgetary restrictions imposed by "Proposition 2 ½." During the six-year period prior to the commencement of the layoffs, both departments had been steadily increasing the percentage of

their black and hispanic members pursuant to consent decrees designed to remedy the present and continuing effects of past racial discrimination. The consent decrees were silent as to layoffs. If this reduction in force were conducted according to strict seniority as prescribed by Massachusetts law,[1] roughly half of the blacks and hispanics hired would be laid off. To prevent this substantial undoing of the progress made in integrating blacks and hispanics into the police and fire departments, the district court granted plaintiffs' motions in these four consolidated cases to modify the prior consent decrees by prohibiting both departments from reducing the percentage of blacks and hispanics in their respective work forces below the level obtaining at the commencement of the force-reduction program. Defendant Massachusetts Civil Service Commission (the Commission) and intervenors Boston Firefighters Union, Local 718, and Boston Police Patrolmen's Association, Inc., have appealed.

There are three fundamental issues: did the district court have the power to modify the consent decrees and, if so, did its orders impermissibly supersede a valid Massachusetts civil service statute or unconstitutionally impose reverse discrimination.

In order to understand the issues and to analyze properly the district court's modification of the consent decrees, it is necessary to begin by tracing the prior proceedings.[2]

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[1] Mass. Gen. Laws Ann. ch. 31, § 5.

[2] We refer throughout this opinion to *Castro et al.* v. *Beecher et al.*, and related proceedings as the "police case." The police case is reported at 334 F. Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975). Similarly, we refer to *Boston Chapter, NAACP, Inc., et al.* v. *Beecher, et al.*, and related proceedings as the "fire case." The fire case is reported at 371 F. Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); 423 F. Supp. 696 (D. Mass. 1976). Both the police and fire cases were reported most recently in Chief Judge Caffrey's consolidated opinion, 522 F. Supp. 873 (D. Mass. 1981), from which this appeal arises.

The Police Case

Plaintiffs, unsuccessful black and hispanic candidates for appointment as Boston police officers, commenced the police action in 1970. They claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with the recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police Department as well as other appointing authorities,[3] including other Massachusetts cities and towns and various state agencies. *Castro et al.* v. *Beecher et al.*, 334 F. Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.).

Following trial, the district court made extensive findings, including findings that in 1970, blacks represented 16.3 percent of the population of Boston but only 3.6 percent of its police force. The district court also found that the 1968-1970 Massachusetts Civil Service Police Entrance Examinations were not job related and discriminated against minorities, including plaintiffs, who did not share "prevailing white culture." *Id.* at 943. It enjoined the Commission from issuing further certifications based on these examinations.

We held on appeal that the examinations were racially discriminatory, and remanded the case with instructions that the district court enter a remedial order requiring a nondiscriminatory, job-related examination and providing for certification of black and hispanic applicants on a priority basis, to be determined in accordance with guidelines that we set forth. *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 730-31, 737-38 (1st Cir. 1972). We noted that the prescribed remedy "will yield a significant increment of black and Spanish-surnamed

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[3] Among the named defendants were the Metropolitan District Commission, the Massachusetts Bay Transportation Authority, and the Capitol Police. 334 F. Supp. at 934.

police officers in the near term" and insisted that relief fashioned by the district court "is to be more than token." *Id.* at 737.

On remand, after observing that unlike most consent decrees, this one had been preceded by full hearings, findings of fact, conclusions of law and several opinions both of the district and appellate courts, the district court approved a comprehensive consent decree, finding that it was "just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces . . . ." 365 F. Supp. 655, 660 (D. Mass. 1973). The decree provided, among other measures, for the creation of civil service certification priority pools, consisting of black and hispanic applicants, and for the implementation of affirmative recruitments programs aimed at this group. *Id.* at 660-62.

In 1975 plaintiffs instituted another action under the All Writs Act, 28 U.S.C. § 1651, seeking to clarify and preserve the effect of the district court's decree in light of litigation that had taken place in Massachusetts courts relating to the rights of cities and towns to grant statutory preferences to residents and veterans in appointing police officers. The court (Caffrey, C.J.) held that the prior decree did not displace these statutory preferences except insofar as the preferences must be applied within the several groups of applicants established by the decree. 386 F. Supp. 1281, 1285 (D. Mass. 1975). It urged that the parties agree upon a substitute consent decree and recommended they follow the one adopted in the fire case, *Boston Chapter, NAACP, Inc. v. Beecher et al.*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir.), *cert. denied*, 421 U.S. 910 (1975). *Id.* at 1286.[4]

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[4] The consent decree finally agreed upon in the police case directed that four groups of eligible police officer candidates be established for each requisitioning police department:

Thereafter the parties entered into a further consent decree, which the district court approved on July 7, 1975. This decree mandated, among other things, certification of police applicants by methods essentially designed to facilitate the appointment in Boston and Springfield of one minority police officer for each white officer, and to expedite minority appointments by other appointing authorities on a ratio of one to three. The decree provided that these remedial measures should apply to any city or town with a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which time further certification would be made according to existing Massachusetts law.[5] The same parity target had already been set in the fire case.

On July 13, 1976, and on June 1, 1979, the district court approved and entered supplemental consent decrees that provided, among other measures, for continuation of the consent decree's method and ratios for certification, for further affirmative recruitment activities, and for monitoring of the civil service examination. They also discharged from further judicial

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Group A consisted of minority applicants who failed discriminatory police entrance exams administered between 1968-1970 but who passed the 1972 interim exam and were otherwise qualified;

Group B consisted of persons on three eligibility lists established in 1970-1971;

Group C consisted of minority candidates not in Group A who passed the 1972 interim examination and were otherwise qualified;

Group D consisted of all other persons who passed the 1972 interim exam and were otherwise qualified.

The consent decree in the fire case contained essentially identical groups of candidates, except it stated that the discriminatory exams targeted by the priority pools were administered from August 1968 to August 1971.

[5] This parity target also applied to the state agencies enumerated in note 3 *supra*, relative to the percentage of minorities in the communities served by those agencies.

supervision the police departments of cities and towns that had attained the parity target according to then current census statistics.

In the spring of 1981, the Boston Police Department initiated the reduction in force program. Thereafter, on April 6, 1981, plaintiffs filed a motion pursuant to Federal Rule Civil Procedure 60(b) to modify prior remedial orders. Following state funding legislation that led to a rescinding of the layoff program for fiscal 1981, plaintiffs requested that the court continue their motion until the program was reinstituted. In the first week of July 1981 the police department reactivated the layoff program, and on July 30, 1981, the district court (Caffrey, C.J.) heard plaintiffs' motion together with a similar motion in the fire case. On August 7, 1981, the opinion and order issued enjoining the Boston Police Department and Fire Department from reducing the percentage of minority officers below the level existing at the commencement of the layoff program.

The Fire Case

Unsuccessful black and hispanic applicants for appointment as City of Boston fire fighters and the Boston Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointing procedures, by the Boston Fire Department as well as by other appointing authorities.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. § 2000e *et seq.*, and the two actions were consolidated.

Following hearings, the district court made extensive findings, including findings that blacks represented approximately 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and that blacks and hispanics represented only 0.9 percent of the fire department's sworn personnel. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. at 514 (Freedman, J.). The court treated the hearings on plaintiffs' challenge to the fire fighters' entrance examination as a trial on the merits pursuant to Federal Rule Civil Procedure 65(a)(2) and found that plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 1968 through August 1971 were discriminatory. It also found that the word-of-mouth recruitment policy resulted in racial discrimination, albeit unintentional. *Id.* at 510, 517 & 519-20.[6]

To afford "affirmative relief to remedy the present effects of past discrimination," the district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. It ordered that the remedial measures mandated by its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the

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[6] The district court concluded that defendants had not rebutted plaintiffs' prima facie case of discrimination established by the statistical disparity between the percentage of minority fire fighters in various fire departments and the relevant local population; it found that the entrance exams were not job related. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. 507, 517 (D. Mass. 1974), citing *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 732 (1st Cir. 1972).

percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." *Id.* at 523.

We affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority hiring and that defendants had not demonstrated job relatedness. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). *See also Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Regarding the subject of an appropriate remedy, we noted that in the police case we had required the district court to institute remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Id.* at 1026. We approved the district court's decree, including the provision that the decree would remain in effect until any particular fire department attains "sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the locality." *Id.* at 1027. We reasoned that the district court's color-conscious relief did not violate the Constitution because it "goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," *id.*, and that "our society [is] well served by taking into account color in the fashion used and carefully limited in extent and duration . . . ." *Id.* We also rejected defendants' contention that the relief was barred by section 703(j)[7] of Title VII, 42 U.S.C. § 2000e-2(j). *Id.* at 1027-28.

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[7] Section 703(j) of Title VII provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national ori-

Since the 1974 decree, the district court has entered several interim consent decrees and stipulations to effectuate its original order. These subsequent orders have set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting.

On April 7, 1981, upon commencement by the City of Boston of its force-reduction program, plaintiffs filed a motion to modify prior remedial orders. As in the police case, proceedings were continued until the consolidated hearing on July 30, 1981. The injunction covering both departments issued on August 7.

The Facts

The statistics are undisputed. At the time of the original filing of these actions, racial discrimination had led to the virtual exclusion of blacks and hispanics from Boston's Police and Fire Departments. In 1970, only 65 of 2,805 police officers were black or hispanic, representing but 2.3 percent of the total. 459 F.2d at 728 n.1, 730. As of 1974, only 18 of 1,983 fire fighters were black or hispanic, representing only 0.9 percent of the total. 371 F.Supp. at 514. In contrast, the minority population of Boston wa more than 16 percent in 1970, 459 F.2d at 728, and approximately 23 percent by 1974. 504 F.2d at 1020 n.4.

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gin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j).

The district court's remedial orders in both cases have produced marked progress eliminating the present and continuing effects of past discrimination. Between 1974 and 1980, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were black or hispanic. As of July 6, 1981, 224 out of a total of 1,912 officers were black or hispanic; minority representation had risen to 11.7 percent. Between 1974 and 1980, the Boston Fire Department hired 553 fire fighters, of whom 248 (45 percent) were black or hispanic. On July 6, 1981, 248 out of a total of 1,690 fire fighters were black or hispanic; minority representation had increased in this department to 14.7 percent.

By 1980, however, the black and hispanic population of Boston had risen to between 29 and 30 percent, almost double the percentage of ten years prior.

Early in July 1981 both the Police and Fire Departments of the City of Boston commenced a systematic program of reduction in force. The city's program proposed six weekly layoffs, running from early July to mid-August. The police and fire departments planned to make these layoffs pursuant to the Massachusetts civil service statute, which requires separations from service in reverse order of seniority. Mass. Gen. Laws Ann. ch. 31, § 39.

Such a layoff program was certain to cause a devastating reduction in the number of black and hispanic officers on both forces. The police department planned to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority,[8] which comprised 54.5 percent

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[8]The Supreme Court has approved of racial preferences granted to "minority" groups of divergent composition. *Compare United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (blacks only) *with Fullilove, et al.* v. *Klutznick, Sec. of Commerce, et al.*, 448 U.S. 448 (1980) (Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts). Throughout this opinion, our references to "minority" group members pertain to blacks and

of the department's entire complement of minority officers. The fire department planned to lay off 207 officers, of whom 113 (54.6 percent) were black or hispanic; this constituted 45.6 percent of all minorities on the force. Unbridled operation of the force-reduction program would have dramatically cut minority representation in both the police and fire departments. By mid-August 1981 only 103 of 1,660 police officers would have been black or hispanic, and minority representation would have fallen from 11.7 percent to 6.2 percent. By mid-August only 135 of 1,483 fire fighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent.

Moreover, although as of July 30, 1981, city officials intended to proceed with only six waves of layoffs, there was no certainty that further force reductions would not occur.

The Decision Below

In its August 7, 1981 consolidated opinion, the district court made the specific findings outlined above. It then found, on the basis of the entire record in both cases, that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2½ amount to 'new and unforeseen conditions'. . . ." *Castro et al.* v. *Beecher et al.*, 522 F.Supp. at 877. It ruled that, in light of the remedial objective of both consent decrees,

> namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, . . . if any-

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hispanics only. Whether a particular individual qualifies as a "minority" group member entitled to relief according to this definition has not been raised by the parties and we proffer no opinion on that question.

> thing similar to Proposition 2½ had been in effect at the time that the remedial decrees were entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Id.

The court also concluded that the denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and fire fighters, and would produce a "grievous wrong." *Id.* Accordingly, the Boston Police Commissioner and Fire Commissioner were enjoined from reducing, "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the program. *Id.* at 877-78. Neither the Police Commission nor the Fire Commissioner has appealed.

I. *THE COURT'S POWER TO REVISE THE CONSENT DECREE*

We initially determine whether the district court was empowered to modify its prior remedial orders because of the impending layoffs. At the outset we note that defendants settled both the police case, filed originally under sections 1981 and 1983, and the fire case, commenced under these sections as well as Title VII, by entering into remedial consent decrees. They did so only after the liability issues had been extensively litigated, resulting in well-supported determinations at the district and circuit levels (with certiorari having been sought

and denied in the fire case), that defendant's certification and recruiting procedures were discriminatory because they had produced an underrepresentation of blacks and hispanics in the police and fire departments, and that these procedures lacked justification in terms of job-relatedness. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424.

The first question is whether *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), bar the relief ordered because intentional discrimination was not proved. We find no bar. It is by no means clear that our decisions in the police and fire cases should have been different had they been decided after *Washington* v. *Davis* and *Arlington Heights*, but in any event the pattern of relief which the present modifications in the decrees seek to preserve was conclusively established prior to those decisions. Neither case stands in the way of the district court's modification of the consent decree. *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 919 (6th Cir. 1979); *Bolder* v. *Penn. State Police*, 73 F.R.D. 370, 371-72 (E.D. Pa. 1976).

We have carefully reviewed the original complaints, the language contained in the decrees, and all district and circuit court opinions in these cases. We can only conclude that the purpose of the decrees and the intervening orders was to eliminate the present and continuing effects of defendants' past discrimination. We reject appellants' contention that the original decrees and subsequent modifications limit relief to correcting features of the certification process found to have violated plaintiffs' constitutional rights as to hiring. These cases encompass the overall issue of shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees: gross discriminatory underrepresentation of persons in the fire and police departments who are not members of the "prevail-

ing white culture."[9] *Castro* v. *Beecher*, 459 F.2d 725, 729-31 (1st Cir. 1972); *see Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *cf. Evans* v. *Buchanan*, 582 F.2d 750, 768 (3d Cir. 1978) (in banc), *cert. denied*, 446 U.S. 223, *reh'g denied*, 447 U.S. 916 (1980).

The district court based its authority to reshape the consent decrees on its finding that the dramatic reduction in minority representation in these departments constituted a showing of a "grievous wrong evoked by new and unforeseen conditions," citing the Supreme Court in *United States* v. *Swift*, 286 U.S. 106, 119 (1932). *Swift* involved an antitrust *defendant* that sought to avoid its obligations pursuant to a consent decree due to changed market conditions. Perhaps a more apt standard was set out by the Supreme Court in *United States* v. *United Shoe Corp.*, 391 U.S. 244 (1968), wherein *plaintiffs* in an antitrust dispute sought revision of their remedy designed to produce "workable competition." *Id.* at 249. There, the Court held that modification was appropriate because time and experience had demonstrated that the decree had failed to accomplish its intended result. *Id. See also System Federation* v. *Wright*, 364 U.S. 642, 647 (1961). In any event there can be no question of the power of a court of equity, upon a sufficient showing, "to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift*, 286 U.S. at 114. Here, there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made.

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[9] Prior orders and stipulations in both cases have dealt with matters going beyond civil service certification measures, including employment of provisional employees, recruiting, appointment targets, rejection of applicants, the effects of statutory preferences for veterans and local residents, mental and physical testing, and firing. *See, e.g.*, 371 F.Supp. at 521-22; 365 F.Supp. at 662-62.

Nor do we think that plaintiffs should be penalized for failing, in negotiating the decrees, to have foreseen the unprecedented change in state and local fiscal policy resulting in the extensive layoff programs. We agree with the district court that, had the parties anticipated any measure such as Proposition 2½, they would have incorporated some provision addressing its potential impact into the decrees. Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees.

The Sixth Circuit's treatment of a virtually identical layoff situation in *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), lends considerable support to our conclusion that modification was within the court's power. In *Brown*, findings of prior illegal discrimination by the Toledo Fire Department formed the predicate of consent decree entered into by the city, which set as a goal that the city "achieve within 5 years a fire department which reflected the racial composition of the city as a whole." *Id.* at 555. The Sixth Circuit upheld the district court's authority to order the same type of modification of the original decree as in this case, reasoning that the language in the decree, although silent as to the effect of layoffs, and the circumstances surrounding the entry of the decree, compelled the conclusion that the "city agreed that it had a constitutional duty to eliminate discrimination in the hiring of firefighters." *Id.* at 562-63. The *Brown* court distinguished its denial of similar relief in *Youngblood* v. *Dalzell*, 568 F.2d 506 (6th Cir. 1978), because in *Youngblood*, unlike *Brown*, there had been no finding of prior discrimination; the original decree contained language expressly denying that the Cincinnati Fire Department had discriminated in its past hiring practices. *Brown* v. *Neeb*, 644 F.2d at 561 & n.18.

Here, as in *Brown*, the defendants entered into consent decrees upon "capitulating to judicial findings of past discrimination." *Brown* v. *Neeb*, 644 F.2d at 562 & n.20; *Boston*

Chapter, NAACP, Inc. v. *Beecher*, April 17, 1975 Interim Consent Decree (fire case), App. at 90-91; *Castro* v. *Beecher*, 365 F.Supp. at 656. Both decrees contain language that warrants concluding that the certifying and appointing authorities are under an affirmative duty to integrate the police and fire departments until the percentage of blacks and hispanics in both departments approximates that of the general population.[10] In addition, neither decree contains any exculpatory language as in *Youngblood*. And, as in *Brown*, if the district court undertook no modification, the layoffs would have eroded significantly, if not completely destroyed, the affirmative action progress made to date. *See Brown* v. *Neeb*, 644 F.2d at 560. Under these circumstances, we conclude that the district court had the authority to modify the consent decrees in the light of new and unforeseen conditions.

We next address the issues of whether the relief ordered was proper and constitutional.

II. *THE COURT ORDER VERSUS THE MASSACHUSETTS SENIORITY STATUTE*

To implement its order prohibiting the Boston Police and Fire Departments from reducing the current level of minority representation, the district court required the maintenance of separate minority and nonminority lists with respect to seniority, reemployment and reinstatement. To this extent, therefore, the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute, Mass. Gen. Laws Ann. ch. 31, § 39.[11] Most

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[10] *See, e.g.*, June 27, 1975 Consent Decree (police case), App. at 122-23; April 17, 1975 Interim Consent Decree (fire case), App. at 93.

[11] Mass. Gen. Laws Ann. ch. 31, § 39 provides in pertinent part:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because

of the cases dealing with the inherent conflict between affirmative action programs and vested seniority rights have concerned private employers and Title VII. And, until recently, the dispute has mainly centered on hiring and promotion.

There are three Supreme Court cases that focus on the problem of seniority rights and discrimination against minorities. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *American Tobacco Co., et al.* v. *Patterson, et al.*, 50 U.S.L.W. 4364 (April 5, 1982). In *Franks* the district court had found that the employer had discriminated in making hiring, transfer, and dischrage decisions, all of which occurred after July 2, 1965, the date on which the prohibition against racial discrimination under Title VII took effect as to private employers. *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 751, 758 n.10. The Supreme Court held that section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) [12] did not "modify or restrict relief

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of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

[12] Relevant portions of § 703(h) of Title VII provide:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided

otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved," *id.* at 761-62, and "that class-based seniority relief for identifiable victims of illegal hiring discrimination was a form of relief generally appropriate under § 706(g)." *Id.* at 779; *accord*, *Teamsters* v. *United States*, 431 U.S. at 346-48; *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *see Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 278 (2d Cir.), *cert. denied*, 102 S.Ct. 397 (1981); *Guardian's Ass'n of New York City* v. Civil Service, 633 F.2d 232, 249-54 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3083 (1981); *Chance* v. *Board of Examiners & Bd. of Educ.*, 534 F.2d 993, 1007 (2d Cir. 1976) (*reh'g in banc*), *cert. denied*, 431 U.S. 965 (1977).

In *Teamsters* the Court did not retreat from the rule set forth in *Franks*, but dealt instead with the effect of section 703(h) on awarding retroactive seniority to redress prior discrimination that had occurred both before and after the effective date of Title VII. The district court in *Teamsters* had found that the employer had discriminated by implementing hiring, assignment and promotion policies that caused black and hispanic employees to occupy the lower paying and less desirable jobs. 431 U.S. at 329-31. As to those plaintiffs claiming that they had been discriminated against after the effective date of Title VII, the Court stood firm on its *Franks* ruling. *Id.* at 347. But the Court denied relief to those plain-

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that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h).

tiffs alleging discrimination that occurred prior to the effective date of the Act and held that an "otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.* at 353-54.

The most recent case, *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364, dealt with the question whether § 703(h) applied to seniority systems adopted after the effective date of Title VII, July 2, 1965. After an exegesis of the statutory history of Title VII, the Court concluded that § 703(h) immunizes a bona fide seniority system whenever adopted unless intentional discrimination was proven. *Id.* at 4367-68. Compare p. 13 *American Tobacco Co.* did not explicitly overrule the holding of *Franks* that § 703(h) does not bar appropriate relief if an illegal discriminatory practice occurring after the effective date of the Act is proved.

We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. The original consent decrees in the cases before us, decided long before the Supreme Court cases, were directed at such independent violations, the use of discriminatory certification examinations. None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Two recent Second Circuit cases are analogous to our situation. *Guardians Ass'n* v. *Civil Service*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3083 (1981), was an action brought under Title VII, Title VI and 42 U.S.C. § 1981 by black and hispanic members of the New York City Police Department, alleging that layoffs carried out pursuant to a last

hired, first fired plan were discriminatory because the Department's entry examinations administered during the years 1968 to 1970 were discriminatory, and that but for such discrimination plaintiffs would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired. The Court upheld the district court's findings that the entry examinations were discriminatory and held that the use of such tests as late as 1974 violated Title VII. It held that § 703(h) did not "immunize post-Act hiring on the basis of an eligibility list reflecting performance on pre-Act discriminatory examinations." *Id.* at 253. In *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (March 3, 1982) (Nos. 81-373, 81-374), the Second Circuit affirmed its holding in *Guardians* that a municipality could be held liable under Title VII for post-Act hiring based on a pre-Act discriminatory hiring list. *Id.* at 272-74.

It is now settled that remedies to right the wrong of past discrimination may suspend valid state laws. *Carter* v. *Gallagher*, 452 F.2d 315, 328 (8th Cir. 1961) (*reh'g in banc*), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Mississippi*, 339 F.2d 679 (5th Cir. 1964); *United States* v. *Duke*, 332 F.2d 759 (5th Cir. 1963). *See generally* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1557-60 (1975).

We emphasize that the district court orders do not completely nullify the seniority statute. Nor do they mandate the firing of any particular employees. The orders allow the statute to be followed so long as the level of minority representation is not reduced beyond that which prevailed at the time the personnel reductions began. The order was designed to operate within the framework of the statute, although modifying it to the extent necessary to preserve the integration already achieved.

We hold that the court's orders prevail over the Massachusetts seniority statute.

III. *THE CONSTITUTIONALITY OF THE ORDERS*

Appellants argue that the orders discriminate against non-minorities and thus are unconstitutional.[13] We first define the issue. This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination.

We turn to the Supreme Court cases, in addition to those already discussed, bearing on the issue. The first case is *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976), which held that section 1981 protects whites as well as blacks from racial discrimination in private employment.

Next came *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). A divided court upheld so much of the judgment of the Supreme Court of California declaring the University's special admission program based on racial quotas unlawful. *Id.* at 270-71. It reversed, however, that portion of the California court's judgment enjoining the University from according any consideration to race in its admission process. *Id.* at 272.

United Steelworkers of America v. *Weber*, 443 U.S. 193, *reh'g denied*, 444 U.S. 889 (1980), comes closer to our problem.

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[13] As a threshold matter, we find that appellants did preserve the reverse discrimination argument for appeal by suggesting the applicability of the reasoning in *Chance* v. *Board of Examiners & Bd. of Educ.*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), at the July 30, 1981 hearing before Judge Caffrey.

In *Weber* the Court held that Title VII does not bar voluntary, private affirmative action undertaken by an employer in collaboration with a union, even when the plan is racially preferential or accomplished through a quota, so long as the plan is directed to eliminating "conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 208-09. Although the court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action," *id.* at 208, it noted that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." *Id.*

The fourth Supreme Court case that bears, albeit tangentially, on the issue is *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). This case upheld the power of Congress to require in a congressional spending program that "10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups." *Id.* at 453.

Although these decisions issued from a sharply divided court and were marked by separate concurrences and dissents, we think it is now firmly established that remedial relief for the effects of past discrimination need not be color-blind and that the use of minority-conscious percentage goals and quotas to overcome the present and ongoing effects of past discrimination is constitutionally permissible. *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1335 (5th Cir. 1980) and cases cited therein. We also think that *Weber* implicitly approves the use of such remedies in sections 1981 and 1983 cases as well as Title VII cases. *See Setser* v. *Novack Inv. Co.*, 657 F.2d 962, 955-67 (8th Cir. 1981) and cases cited therein.

None of the other Supreme Court cases, however, involve public employment nor address directly the situation before

us; the conflict between a last hired, first fired seniority system and court orders seeking to maintain some semblance of racial balance in municipal Police and Fire Departments. There is no blinking the fact that there is significant difference between hiring and promoting in accord with a race-conscious ratio and insulating from discharge a percentage of employees because they are members of a minority group. In the former situation, there is only a postponement of expectations; in the layoff sitation, employees with greater seniority lose their jobs. *See Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 n.12 (6th Cir. 1979); Judge Skelly Wright, *Color-Blind Theories and Color Conscious Remedies*, 47 U. Chi. L. Rev. 213, 238-40 (1980).

We do not think the issue can be resolved by simply following the Title VII cases and awarding constructive seniority to those minority members of the departments that can show that they were discriminated against by the entry examinations given in 1968-1970. This is not an action for damages. The relief sought originally was not for individuals, but to correct a condition of racial imbalance. We do not know the exact effect the award of constructive seniority to the identifiable victims of the past discrimination would have on the minority percentages of the departments. Considering, however, that more than ten years have passed, we do know that such a limited remedy would result in minority ratios far below that set by the district court.[14]

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[14] In response to an inquiry at oral argument, we have been informed that the earliest seniority date of minority police officers laid off is June 1980, and the earliest seniority date of laid-off white police officers is December 30, 1970. We have also been told that of the 258 police officers laid off, 34 are minority and that if it were not for the order of the district court, 130 minority officers, 126 white officers, and 2 oriental officers would have been laid off. As a result of the order, 81 minority officers were recalled so as to maintain the 11.7% minority representation in the department. On a percentage

It must be stressed that the orders here do not require the continuation of the affirmative action programs by the hiring of minorities and the firing of whites. All they do is preserve the status quo at a 14.7 percent minority ratio for fire fighters and an 11.7 percent for policemen. Against a background of a present 30 percent minority population in Boston, this hardly can be deemed overreaching. Nor do we think it can fairly be characterized as "unnecessarily trammeling" the interests of the whites. *United States* v. *Weber*, 443 U.S. at 208. The fact of past discrimination agreed to in both cases constitutes a "compelling need" for a minority-conscious remedy. The proper test is one of reasonableness. *See Morgan, et al.* v. *O'Bryant, et al.*, Nos. 81-1561, 1617, 1618, 1619, and 1646, slip op. at 10-11 (1st Cir. February 17, 1982). The orders of the district court meet the test of reasonableness. They were necessary to prevent the departments from regressing to the state of precipitous racial imbalance that prevailed at the commencement of this litigation more than ten years ago.

We are acutely aware that some white policemen and fire fighters who, understandably, regard the seniority system as an inalienable right and who have been innocent themselves of any discrimination will lose their jobs, at least temporarily.[15]

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basis, the district court's order means that a little more than 13% of those laid off are members of the minority group.

[15] If a fire fighter or police officer with permanent civil service status is laid off as a result of a reduction in force, that individual will be placed on reemployment lists by the Director of Personnel Administration. A reemployment list establishes for a laid-off fire fighter or police officer the right to be certified to all municipalities for a period of two years from his layoff, ahead of all other persons eligible for appointment as police officers or fire fighters. Mass. Gen. Laws Ann. ch. 31, § 40. In addition, a police officer or fire fighter has the right to be reinstated to a vacancy within the department from which he was laid off for five years after the date of his termination — again with preference over all other eligible applicants. Mass. Gen. Laws Ann. ch. 31, § 39.

We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities. This is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments.

An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent. We are concerned here not with simply redressing the rights of individuals who suffered racial discrimination; the issue is whether the progress made to date in integrating the departments will be preserved. As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F. Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most.

> The argument that police need more minority officers if not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

The probable extent of recalls in both departments is not yet clear, although some evidence does exist that in fact reinstatement of at least some of the laid-off employees has taken place or will occur.

Detroit Police Officer's Ass'n v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979).

It is significant that the only circuit case directly on point, *Brown* v. *Neeb*, 644 F.2d at 564, held: "To the extent that the seniority system is an obstacle to the city of Toledo's duty to eliminate past discrimination the district court can set it aside."

We find no constitutional bar. It is now accepted that minority-conscious quotas can be used as a tool to prevent discrimination and to advance integration of the work force in hiring and promotion situations. The imposition of constructive seniority to offset the effects of a last hired, first fired system has been used with increasing frequency since *Franks* in Title VII cases. While the orders place a relatively greater share of the burdens of the layoffs upon nonminorities, this does not constitute "reverse discrimination." The layoffs here were bound to cause undeserved injury in any event. While seniority was the normal way to decide who must go first, there is nothing magical about seniority, and here common sense suggests that it should be tempered by other entirely rational considerations so that the racial equity achieved at considerable effort in the past decade not be erased. In *Bakke*, not an employment case, the Supreme Court refused to enjoin the University from giving any consideration to race in its admissions process. It is a simple fact that discrimination against blacks and other minorities was long accepted and condoned in this country. To a minority police officer or fire fighter hired within the last ten years, the imposition of a rigid last hired, first fired seniority system would only mean that once again the dominant white culture had protected its own kind at the expense of blacks and hispanics. If the evil of racial discrimination is to be fought openly, we must not allow ourselves to be caught in a semantic web of aphorisms such as "reverse discrimination" that in the final analysis serve only to perpetuate the discrimination of the past.

We rule that the district court had the equitable power to modify the consent decrees, that the Massachusetts statutory last hired, first fired seniority system is not insulated from the court's orders, and that the orders are not unconstitutional.

Affirmed.

Appendix I.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PEDRO CASTRO, ET AL.,
Plaintiffs,

v.

CIVIL ACTION NOS.
70-1220-C
74-2982-C

NANCY B. BEECHER, ET AL.,
Defendants.

ORDER
August 7, 1981

CAFFREY, Ch. J.

This matter having come on for hearing on plaintiffs' motion to modify prior remedial orders; and the Court having considered the prior proceedings had herein, further evidence regarding proposed reductions in force affecting the Police Department of the City of Boston, the parties' briefs and the arguments of counsel; and the Court having found that a material change in circumstances — namely, the effective and proposed reductions in force — would nullify the Court's prior remedial orders and frustrate the intent of those orders; and the Court having found that modification of those prior remedial orders through entry of the within order is necessary to prevent that consequence, it is therefore,

ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant Commissioner of Police of the City of Boston is hereby restrained and enjoined from reducing, pursuant to any departmental or city program of reductions in force of police personnel on account of lack of funds or abolition of position, the percentage of black and Spanish-surnamed post-probationary police officers in the City of Boston Police Department below the level of 11.7 percent of all such officers.

2. For the purpose of implementing this order, the defendant Commissioner of Police of the City of Boston shall establish and maintain separate seniority lists of post-probationary police officers, one for minority officers and one for non-minority officers and shall use such separate lists in implementing any program of reductions in force on account of lack of funds or abolition of positions. Within each separate seniority list, the seniority of each officer shall be computed pursuant to statute, M.G.L. c. 31 § 33.

3. As police officers in the Boston Police Department are separated from their positions because of lack of funds or abolition of positions, the defendant Fire Commissioner may terminate officers according to strict seniority until the reduction in force results in a reduction of the percentage of black and Spanish-surnamed police officers below 11.7 percent. At that point, the Commissioner shall utilize separate seniority lists for minority and non-minority police officers and shall terminate the least senior police officers from each of the two lists according to a mathematical ratio so that the percentage of black and Spanish-surnamed officers at no time falls below 11.7 percent. Nothing herein shall disturb application of Massachusetts statutory preferences; provided that such preferences are applied solely within the separate seniority lists.

4. In the event that a police officer's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination

set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

5. For the purpose of continuing the implementation of this Court's prior orders, the defendant Personnel Administrator is ordered to place the names of all City of Boston police who are laid off for lack of funds or abolition of position on the Civil Service re-employment and reinstatement lists in the order in which they are laid off. Reinstatement and re-employment of firefighters on such lists shall be accomplished by the Personnel Administrator and by the Commissioner of Police in reverse order of such layoffs and in a manner so that the percentage of black and Spanish-surnamed officers does not fall below 11.7 percent. The Personnel Administrator, upon receipt of any requisition for hiring, shall certify names from such lists prior to certifying names from any other list.

6. The parties are instructed to confer and negotiate with respect to any further practices and procedures necessary and appropriate for the implementation of the provisions of this order.

/s/ Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PEDRO CASTRO, ET AL,
Plaintiff,

v.

CIVIL ACTION NOS.
70-1220-C
74-2982-C

NANCY B. BEECHER,
ET AL,
Defendants.

BOSTON CHAPTER, NAACP,
ET AL,
Plaintiffs,

v.

CIVIL ACTION
NO. 72-3060-C

NANCY B. BEECHER, ET AL,
Defendants

UNITED STATES OF AMERICA,
Plainfiff,

v.

CIVIL ACTION
NO. 73-269-C

CITY OF BOSTON, ET AL,
Defendants.

OPINION
August 7, 1981

CAFFREY, Ch. J.

These four cases, all of which have long since gone to judgment, are before the Court on motions filed by the plaintiffs in each case to modify prior remedial orders. All four cases raise substantially the same legal issue, i.e. may the City of Boston

in conducting reductions in force in the Boston Police and Fire Departments decide which police officers and which firemen to terminate on the basis of seniority as directed by M.G.L. c. 31 § 39, or must the City of Boston maintain the percentage of minority representation existing as of July 6, 1981 by persons who are either black or hispanic.

The past history of this litigation may be summarized as follows: The police case was begun and assigned to the Honorable Charles E. Wyzanski, Jr., who tried the case and entered a judgment, after which an appeal was taken to the First Circuit and the Court of Appeals filed an opinion giving directions for further proceedings by Judge Wyzanski. Judge Wyzanski made additional rulings and then subsequent litigation in the police case was assigned to and handled by the undersigned, including the monitoring of remedial measures. (For further background information see the undersigned's opinion of January 7, 1975 reported in 386 F.Supp. 1281.)

For present purposes suffice it to say that this action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston Police officers. Plaintiffs claimed racial discrimination in the recruitment and certification practices initiated by the Massachusetts Civil Service Commission and implemented, through appointment procedures by the police forces of the City of Boston, other cities and towns, and other appointing authorities subject to Massachusetts Civil Service regulations. Following trial, Judge Wyzanski made extensive findings, including findings that, in 1960, blacks represented 9 percent of the population of Boston and but 2 percent of its police force and, in 1970, 16.3 percent of the population and but 3.6 percent of the police force. Judge Wyzanski also found that the Massachusetts Civil Service Police Entrance Examination discriminated against minorities who did not share mainstream white culture. Judge Wyzanski held that plaintiffs had been discriminated against. 334 F.Supp. 943 (1971).

Appeal followed to the First Circuit. The Court of Appeals held that the civil service examinations were racially discriminatory. The Court of Appeals remanded the case with instructions that the district court enter a remedial order providing for implementation of a substantially job-related examination and providing for certification of black and hispanic applicants on a priority basis to be determined, under guidelines recommended by the Court of Appeals, by the District Court. The Court of Appeals insisted that relief "is to be more than token." 459 F.2d 725, 737 (1972).

On remand Judge Wyzanski approved and entered a comprehensive consent decree, finding that it was "just, reasonable and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective non-discriminatory, dedicated, and honorable police forces . . . ." 365 F.Supp. 655, 660 (1973). The remedial order provided, among other measures, for the establishment of civil service certification priority pools consisting of certain black and Spanish-surnamed applicants, and for the implementation of affirmative recruitment programs for the purpose of recruiting black and Spanish-surnamed police applicants. *Id.* at 660-662 (1973). Immediately prior to approval of the consent decree, Judge Wyzanski had issued an opinion exhorting the parties to reach agreement on the provisions of the decree, in the course of which he observed:

> there is a *prima facia* presumption that on a job-related examination which is reasonably set to meet merely the requirements (and not something above the requirements) of a police patrolman's job, the percentage of successful black and Spanish-speaking persons who would choose to be patrolmen and who also would meet the requirements of the job would nearly approximate the percentage of blacks and Spanish-speaking persons in the population of the Commonwealth. *Id.* at 655.

In 1975 plaintiffs brought an action pursuant to the All Writs Act for the purpose of clarifying and preserving the effect of the prior consent decree in light of proceedings which had taken place in the Massachusetts Superior and Supreme Judicial Courts upon applications by certain Massachusetts cities and towns to establish the right to appoint police officers in accordance with certain statutory preferences. The action was assigned to the undersigned, who subsequently has supervised all aspects of the two consolidated police cases, including holding that statutory preferences were not displaced by the prior consent decree except to the extent that the preferences must be applied within the several groups established by the priority appointment procedures contained in the consent decree. I also further requested the parties to arrive at a substitute consent decree and recommended the remedy adopted in *NAACP* v. *Beecher*, 371 F.Supp. 507 (D.Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1975). 386 F.Supp. 1281 (1975).

Thereafter, all parties entered into a consent decree, approved and entered by the Court on July 7, 1975. This consent decree provides, among other measures, for the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations. This decree required certification of police applicants by methods in essence designed to facilitate the appointment by Boston and Springfield of one minority policeman for each white policeman, and to facilitate the appointment by other appointing authorities on a ratio of one to three. The decree also provided that the method and ratios of certification provided for by the decree shall apply to all cities and towns which have a minority population of one percent or more until any such city or town "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which

point further certification will be made in accordance with existing Massachusetts law. This parity target had been established by the Court in the *NAACP* v. *Beecher* decree to which I previously directed the parties.

On July 13, 1976, the writer approved and entered a supplemental consent decree. This decree contained further administrative procedures for monitoring the continuing implementation of prior decrees. This decree also exempted from further application of the method and ratios of certification contained in the July 7, 1975 consent decree the police departments of 81 cities and towns which had attained parity of the percentage of blacks and hispanics in police service with the percentage of blacks and hispanics in municipal population according to then current census statistics. Ninety one cities and towns plus the MBTA, MDC and Capitol Police forces remain subject to the decree.

On June 1, 1979 I further approved and entered an agreement as to the May, 1978 examination which provided, among other measures, for the continuing applicability of the method and ratios for certification provided for by the 1975 consent decree and for further recruitment activities and monitoring of the civil service examination.

As found in prior proceedings, in 1970 the Boston Police Department employed 2805 officers. Sixty-five of these were black or Spanish-surnamed, representing 2.3 percent. 459 F.2d at 728, 730. At the same time, the population of the city was 16.3 percent black. *Id.* at 728.

Since 1973, as a result of implementation of this Court's orders, Boston has increased the representation of minorities in the Police Department from 2.3 percent to 11.7 percent. Pursuant to the methods, ratios and procedures provided for by prior decrees, the Boston Police Department has hired, between 1974 and the present, 451 police officers, of whom 243 (53.88 percent) have been white and 208 (46 percent) have

been Black, Spanish-surnamed and other minorities. However, the minority population of Boston has increased during the intervening decade to 30 percent. The percentage of black and hispanic officers in the Police Department, therefore, remains far below the percentage of minorities in the city and the parity level which the Court's prior remedial orders were designed to achieve.

Against this background, the City of Boston presently plans, and has begun to implement, massive reductions in work force in the Boston police and fire departments for alleged reasons of fiscal austerity.

I find on the basis of stipulations entered into by the parties on July 29, 1981, that reductions in force now being conducted, and scheduled for completion on August 18, 1981, would reduce minority representation in the police force to 6.2%, contrasted with the 11.7% as of July 6, 1981. Similar reductions in the Fire Department, to be completed on August 12, 1981, would leave a 9.1% minority representation, as compared with the 14.7% level of July 6, 1981.

The litigation involving the members of the Fire Department has followed a substantially similar course down through the years and is described with far greater specificity than is necessary for present purposes in an opinion filed by Judge Freedman on February 8, 1974, reported in 371 F.Supp. 507 (1974). The firemen's cases were later transferred from Judge Freedman to the Honorable John J. McNaught in whose temporary absence the firemen's cases are also being handled by the undersigned.

Given the foregoing, it should be noted that contrary to specious arguments for counsel for the state respondents, this motion does not constitute the filing of a new complaint, does not warrant respondents filing an answer, and does not require a new trial. Stating the matter affirmatively, this motion is a request that this Court modify a remedial decree which

it has been monitoring for many years. The Court clearly has power to do so on the basis of both Rule 60(b)(6) of the Federal Rules of Civil Procedure and under its inherent equitable power. It was so ruled by the Supreme Court of the United States in *United States* v. *Swift*, 286 U.S. 106 (1932) where (at page 115) the Supreme Court stated:

> A Court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

The standard to be followed by a district court in deciding whether and when to exercise its inherent right to modify a remedial decree was also stated by the Supreme Court in *United States* v. *Swift* (at page 119) where the Court told us:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.

I rule on the basis of the entire record of these cases from 1970 to date:

1. that the orders previously entered in all of these cases were decreed after years of litigation;

2. that the massive firings claimed by municipal authorities to be a result of the voters enacting Proposition 2½ amount to "new and unforeseen conditions" within the *Swift* ruling: and

3. that if this Court fails to modify the decree, as requested by plaintiffs' motions, then a grievous wrong would be produced by this Court's non-action, i.e. a refusal to amend the remedial order would allow the substantial eradication of all

progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970.

4. that it is obvious from the opinion of the United States Court of Appeals for the First Circuit that using M.G.L. c. 31 § 39 to *de facto* reverse all of the results granted over the past 11 years would not be tolerated by that Court. Cf. *Brown* v. *Neeb*, C.A. No. 72-282, July 3, 1980 (N.D. Ohio); *aff'd* March 3, 1981 (6th Cir.).

It should be noted in view of the argument by various respondents that the earlier remedial decrees do not talk about terminations, that the argument first of all is factually fallacious in that both Judge Wyzanski and this writer have made reference to terminations, see Section IV, part. 5(e), Consent Decree by Wyzanski, J., 365 F.Supp. 655, 662 (1973), and para. 19(b), Consent Decree by Caffrey, Ch. J., unreported, July 7, 1975. Secondly, and more importantly, it is beyond argument that, given the nature of the remedial decrees directed by the Court of Appeals, and given the objective thereof, namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, that if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Accordingly, I rule that an order should enter granting plaintiffs' motions to modify prior remedial orders and enjoining respondents from reducing the percentage of black and hispanic police officers on the City of Boston police force below the 11.7% of July 6, 1981, and enjoining the City of Boston from reducing the number of black and hispanic members of the Fire department below the 14.7% of July 6, 1981.

/s/ Andrew A. Caffrey, Ch. J.

Appendix J.

§ 33. Seniority; computing length of service

For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment; provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty for which compensation was paid pursuant to chapter one hundred and fifty-two, provided that the employee notifies the appointing authority, in writing, not later than six months after the final payment of compensation aforesaid that he is ready, willing, and able to do his former work and files with said appointing authority a certificate of a registered physician that he is able to perform the duties of his position in an efficient manner, and is restored to the payroll.

If, as a result of a reinstatement made pursuant to section forty-six, a person is restored to employment in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under

such reinstatement, but upon continuous service in such unit for three years or twice the length of his absence from the payroll, whichever is greater, his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.

If the employment of such full-time employee is changed through an original or promotional appointment or transfer from one departmental unit of the commonwealth to another under the same appointing authority, or from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the employment of such full-time employee is changed through an original or promotional appointment from one departmental unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.

If the employment of such full-time employee is changed by transfer from one departmental unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed in the following manner: (1) if the transfer was

made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer; (2) if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer.

The length of service of a permanent employee appointed on less than a full-time basis shall be computed from the date of such appointment, without regard to absences from the payroll which were not voluntary on the part of such employee. Regardless of actual length of service, permanent employees appointed on less than a full-time basis shall, for purposes of determining seniority, rank below all full-time permanent employees.

. . . . . .

§ 39. Separation from employment; lack of work or money; abolition of position

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or

similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appo nting authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

Appendix K.

Massachusetts Acts of 1982

Chapter 190

AN ACT Establishing the City of Boston Funding Loan Act of Nineteen Hundred and Eighty-Two And The Massachusetts Convention Center Authority.

Section 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in

injured leave under the provisions of section one hundred and eleven F of chapter fortyone of the General Laws. the mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

Appendix L.

August 6, 1984

Civil Clerk
First Circuit Court of Appeals
U.S. Post Office and Court House
Boston, Massachusetts 02109

RE: *Boston Police Patrolmen's Association, Inc., Pedro Castro, et al.* — No. 83-885

Dear Sir:

Enclosed please find in the above entitled case, Response of Commissioner of Police of the City of Boston To Intervenor's Motion For Allowance of Oral Argument On Remand From The Supreme Court of the United States.

Please docket and file the same. Thank you.

Sincerely,

/s/ _____
Steven P. Perlmutter
Assistant Corporation Counsel
Phone: 725-4026

SPP/as
Enclosure

cc: Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the attached document by causing to be delivered in hand or by causing to be mailed postage prepaid a copy thereof to counsel of record:

E. Michael Sloman
Thomas A. Barnico
Assistant Attorneys Generals
Government Bureau
One Ashburton Place, Rm 02109
Boston, Massachusetts

Peggy Wiesenberg
Lawyers' Committee For Civil Rights Under Law
294 Washington Street, Rm 506
Boston, Massachusetts 02108

James S. Dittman
Sixty State Street
Boston, Massachusetts 02109

Frank J. McGee
1952 Ocean Street
Marshfield, Massachusetts 02050

John McMahon, Esquire
44 School Street
Boston, Massachusetts 02108

8/6/84
Date

/s/
Steven P. Perlmutter
Assistant Corporation Counsel
City of Boston Law Department
Room 615, City Hall
Boston, Massachusetts 02201
Phone: 725-4026

THE SUPREME COURT OF THE UNITED STATES

No. 83-885

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner

v.

PEDRO CASTRO, ET AL.,
Respondents

RESPONSE OF COMMISSIONER OF POLICE OF THE CITY OF BOSTON TO INTERVENOR'S MOTION FOR ALLOWANCE OF ORAL ARGUMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

The Police Commissioner of the City of Boston (Commissioner) moves that before the intervenor is permitted oral argument on remand it submit to the court a brief explaining how the Supreme Court's opinion in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. __ 1984 overrules or affects in any way this court's holding that the instant case is moot. *Boston Chapter, NAACP v. Beecher*, 716 F.2d 931 (1st Cir. 1983). This procedure will facilitate the delineation of the issues on remand and assist the court in determining whether or not there is cause for further oral argument in this case.

THE POLICE COMMISSIONER
OF THE CITY OF BOSTON

By his attorney,

/s/ _____

Steven P. Perlmutter
Assistant Corporation Counsel
City of Boston Law Department
Room 615, City Hall
Boston, Massachusetts 02201
Phone: 725-4026

(2) (2)

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1393, 84-1430.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit.

JAMES S. DITTMAR*,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200
BARBARA R. ARNWINE,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145
Counsel for Respondents
**Counsel of Record*

Of Counsel:
RICHARD R. LAVIN,
MATTHEW D. BAXTER,
WIDETT, SLATER & GOLDMAN, P.C.,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Question Presented.

Should the Court grant certiorari to review a mootness decision which the Court has already considered and committed to the court of appeals, which has no applicability beyond the circumstances of these cases, which is challenged by reliance on matters not in the record and involving undecided issues of state law and which is in any event correct.

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Nos. 84-1393, 84-1430.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
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RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

Respondents agree with the identification of the opinions below stated in the petitions for certiorari, but note that the consolidated opinion on remand of the United States Court of Appeals for the First Circuit has been reported at 749 F.2d 102 (1st Cir. 1984).

Constitutional and Statutory Provisions.

The petitions involve U.S. Const. Art. III, § 2, cl. 1, which is reproduced at 6a of the Appendix to the petition of Boston Firefighters Union, Local 718.

The statutes involved are 1982 Mass. Acts, c. 190, § 25, which is reproduced at page 6a of the Appendix to the petition of Boston Firefighters Union, Local 718, and Mass. G.L. c. 31, § 43, which is reproduced at page 1a of the Appendix to this brief.

Statement of the Case.

These petitions seek to have the Court grant certiorari in order to decide a question of mootness which the Court has already considered and committed to the court of appeals. Further review by the Court is unnecessary.

A. *Prior Proceedings.*

The court of appeals found moot a controversy which arose in the course of ongoing judicial adminstration of relief in consolidated employment discrimination cases relating to Boston's police and fire departments. The cases have lengthy histories, with which the Court is familiar. See Supreme Court Nos. 81-185, 82-246, 82-259. The controversy which the court of appeals found moot, however, was more recent and short-lived.

In July 1981, assertedly in response to a fiscal crisis, the City of Boston instituted a massive reduction in force program in its police and fire departments. The program was to be administered in accordance with the Massachusetts civil service

statute, which requires layoffs in reverse order of seniority. Black and Hispanic police officers and firefighters challenged the layoff program by applying to the district court for modification of prior court orders in order to prevent the City from reducing their proportional representation below the levels obtaining at the time the program commenced.

The minority officers' requests for modification were opposed by the state civil service officials and intervening unions. They were not opposed by the City or its police and fire commissioners.

The district court held that the layoff program, if administered in accordance with the Massachusetts seniority statute, would interfere with the court's ongoing remedial process. By orders dated August 7, 1981, the court enjoined the police and fire commissioners from reducing the percentage of minority officers obtaining at the commencement of the layoff program.

The court of appeals affirmed.

B. *The Political Resolution.*

In June 1982, Massachusetts enacted legislation resolving the City's asserted fiscal crisis and rescinding the reduction in force program. 1982 Mass. Acts c. 190. The statute, locally known as the Tregor Act, provided the City with new funds and required the reinstatement of all police officers and firefighters who had been laid off as a result of the reduction in force program. *Id.* § 25. The Tregor Act also provided that the City shall not terminate or otherwise separate any reinstated personnel from active service "in the future for lack of funds." *Id.* Finally, the Act required the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. *Id.* As a result of the Tregor Act, the imminent threat of layoffs was removed and the police and fire departments reinstated with restored seniority all personnel who had

been terminated during the City's 1981 reduction in force program.

C. *Disposition by the Court in 1983.*

Following enactment of the Tregor Act, the police and fire unions and the state civil service officials petitioned for certiorari. The Court granted certiorari, and on April 18, 1983 the Court heard oral argument on the merits. In their brief on the merits and at oral argument, the minority officers suggested that the controversy giving rise to the lower courts' decisions had become moot.

On May 16, 1983, the Court issued a per curiam decision which vacated the judgment of the court of appeals and remanded the cases for consideration of mootness in light of the Tregor Act. *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc.*, 461 U.S. 477 (1983).

D. *1983 Proceedings on Remand.*

On August 31, 1983, the court of appeals held that the minority officers' motions to modify the prior remedial decrees were moot. *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (1st Cir. 1983). The court of appeals held that "to avoid mootness a case must present both live issues and parties with legally cognizable interests." *Id.* at 933. In light of the Tregor Act's mandatory reinstatement of all laid-off officers with restored seniority and its removal of the imminent threat of further layoffs, the court of appeals concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding" and that a ruling by the federal court "would amount to no more than an advisory opinion." *Id.* The court of appeals vacated the district court's August 7, 1981 orders and remanded the cases to the

district court with instructions to dismiss the motions for modification as moot.

On December 30, 1983, the district court entered a final order vacating its August 7, 1981 orders and dismissing the minority officers' motions for modification.

E. *Disposition by the Court in 1984.*

Following the court of appeals' 1983 decision on remand, the police and fire unions again petitioned for certiorari. The state civil service defendants did not. Neither, of course, did the City defendants.

While these petitions for certiorari were pending, the Court decided *Firefighters Local Union No. 1784* v. *Stotts*, ___ U.S. ___, 104 S.Ct. 3576 (1984) ("*Stotts*"). In that case, the Court ruled upon the scope of judicial relief under Title VII and its permissible impact upon bona fide seniority systems at a time of layoffs. These issues were similar to the issues on the merits which had previously been presented in the Boston cases when minority officers had sought to restrain Boston's layoff program. The Court in *Stotts* also considered whether the controversy in that case had become moot pending appeal.

On July 5, 1984, the Court granted certiorari in these cases. The Court vacated the 1983 judgment of the court of appeals and remanded to that court for further consideration in light of *Stotts*.

F. *The Court of Appeals' 1984 Decision on Remand.*

In compliance with the Court's mandate, the court of appeals thoroughly reviewed the impact of *Stotts* on these cases. The parties were invited to identify matters for consideration by the court and were provided with an opportunity to brief and argue the issue of mootness fully. Following briefing and oral

argument, and based upon the court's review of the entire record, on December 7, 1984, in a per curiam decision, the court of appeals concluded that these cases are moot. *Boston Chapter, NAACP* v. *Beecher*, 749 F.2d 102 (1st Cir. 1984).

Upon careful consideration, it was evident to the court of appeals that these cases "differ[ed] from *Stotts*, in respect to mootness, in several important ways." *Id.* at 104. First, in *Stotts*, the minority officers had received permanently enhanced seniority as a result of the district court's injunction. In these cases, however, "the parties agree that there is no seniority problem or issue." *Id.* Second, unlike in *Stotts*, the City employer, which is a necessary party to any disposition of back pay claims, is not a real party participating in these cases, and the court of appeals held that "[s]ince no party before [the court] has any financial stake in denying the laid-off employees' back pay, it is difficult to see how this matter can create a controversy between them." *Id.* Third, the district court's 1981 orders in these cases had already been vacated. Therefore, to hold that these cases are not moot "would mean resurrecting a dead order solely for the purpose of then striking it down on the merits." *Id.* Fourth, there is no longer any controversy about the merits or about the future impact of any prior ruling of the district court given the intervening *Stotts* decision. *Id.*

Giving consideration both to these distinctions and to basic principles of federal jurisdiction, the court of appeals concluded that the "legally correct approach" was to vacate the district court's 1981 orders as moot. *Id.*

On January 4, 1985, the district court once again entered an order dismissing as moot the minority officers' motions for modification.

Reasons for Denying the Writs.

I. The Court of Appeals' Mootness Decision Does Not Present a Substantial Federal Question.

Petitioners seek certiorari review of a decision which does not warrant such attention. The court of appeals addressed a question of mootness in light of facts and in the context of proceedings which are peculiar to these cases alone. Further decision regarding the particular mootness issues presented here will have no impact beyond the confines of these cases.

When the Court first granted certiorari in these cases in 1982, the decision then under review addressed a question of national importance regarding the scope of judicial relief under Title VII and its permissible impact, at a time of layoffs, on bona fide seniority systems. Subsequently, however, the Court has answered that question in *Stotts*. As a result, these cases no longer present an unresolved question of public importance which warrants decision by the Court. They present a question of mootness alone.

Mootness, however, depends peculiarly upon the unique set of factual circumstances and claims which obtains in any particular case. Indeed, the Court implicitly recognized this fact when it remanded these cases to the court of appeals following the *Stotts* decision. The only question presented here, therefore, does not raise any issue of unresolved federal law, national concern or even public importance. The scope of any further decision by the Court would be limited to the facts of these cases alone.

In any event, to the extent that the Court may wish to announce principles of mootness in cases involving employment layoffs, it has already spoken in *Stotts*. The express purpose of the Court's 1984 remand was to enable the court of

appeals to apply the principles announced in *Stotts*. This the court of appeals has done, and further review would serve no significant purpose.[1]

II. The Petitions Rely Upon Matters of Fact Not in the Record and Involve Undecided Issues of State Law.

These petitions are based on petitioners' assertion of factual matters which are not in the record and on their questionable speculation that a decision by the Court may influence application of state law in separate state proceedings. The Court should decline review under such circumstances.

The unions' petitions are premised on the notion that the Court should grant review and decide a mootness question in order to reach a decision on the merits which might in turn have some effect upon the resolution of certain union members' claims for back pay brought in Massachusetts Civil Service Commission proceedings. See Firefighters' petition at 6; Police Officers' petition at 15. This assertion cannot be adequately evaluated by the Court, however, since the record below contains virtually no information relating to these back pay claims or to the nature or status of any such state proceedings. To be sure, the unions asserted to the court of appeals, as they do to the Court in their present petitions, that back pay claims had been brought by some officers. Beyond that, however, there is nothing in the record which indicates the nature of the

[1] Should the Court deem further review to be appropriate, the Court should base its decision on a complete and thorough examination of the facts of these cases. Summary disposition of these cases, as suggested by the firefighters' union, would be wholly inappropriate. If it were appropriate, the Court could have taken such summary action in 1984 when these cases were last before the Court. Furthermore, only a reasoned opinion by the Court would clarify any error by the court of appeals.

claims assertedly made in the administrative proceedings, identifies the issues raised by the parties who are participating in those proceedings, clarifies the present state of those proceedings, discusses the state law applicable to those claims or suggests how any federal court decision will impact those state proceedings. The unions' petitions are understandably devoid of citation to any record material which would supply this information.[2]

In any event, the back pay claims must be made under state law, and it is likely that the Massachusetts Civil Service Commission will resolve, or has already resolved, those claims independently and regardless of any disposition of the federal court proceedings. The issue raised in the civil service proceedings presumably is whether, as a matter of state law, the layoffs of complaining officers were "justified." Massachusetts General Laws c. 31, § 43. If resolution of the federal controversy is unnecessary to disposition of this issue of state law, then even the unions — or, more precisely, some of their members — would have no basis to claim an interest in the outcome of the federal proceedings.

On the one hand, Massachusetts law, as well as federal law, suggests that federal appellate review of the August 7, 1981

[2] The police union petition does not in fact assert that there is any proceeding, of any sort, presently pending with respect to the impact of the layoff program upon police officers. The union, thus, does not even assert, let alone substantiate by record citation, the existence of any pending back pay claim which a decision by the Court might ever influence. Respondents, in fact, understand that on February 11, 1982, the Massachusetts Civil Service Commission denied police officers' claims for back pay, that no appeal has ever been taken from that decision to the Massachusetts courts and that those proceedings are, accordingly, closed. The police union, consequently, seeks an academic, not even an advisory, decision. The firefighters' petition, on the other hand, asserts that there are state administrative proceedings which are pending, but it concedes that there are numerous other issues, distinct from any issue relating to the validity of the district court's August 7, 1981 orders, which may be dispositive of those claims for back pay. Firefighters' petition at 5.

orders, even if it resulted in a reversal, would have no bearing upon the state law issue. Boston's 1981 layoffs were implemented pursuant to federal court orders. As such, it would appear that they were justified at the time they were implemented. This justification would not be negated by subsequent reversal of the orders, for a court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain duty to obey until the order is stayed, vacated or reversed. *E.g. Town of Stow* v. *Marinelli*, 352 Mass. 738, 743-744, 227 N.E.2d 708, 713 (1967); *Maness* v. *Meyers*, 419 U.S. 449, 458-459 (1975); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947). Indeed, this was precisely the reasoning adopted by a hearing officer for the Massachusetts Civil Service Commission in a November 28, 1983 decision recommending that the Commission deny certain non-minority firefighters' claims for back pay. Recommended Decision, *McPherson, et al.* v. *City of Boston Fire Department*, Appointing Authority, Massachusetts Civil Service Commission, Appeal No. D-1280 at 15 (November 28, 1983). If this ruling is correct as a matter of Massachusetts law, then no federal court reversal of the district court's August 7, 1981 orders would have any bearing on any back pay claim under state law.

On the other hand, non-minority officers might also argue, or the Civil Service Commission might rule, that under Massachusetts law the City of Boston was not justified in laying off senior officers notwithstanding the entry of the district court's orders. It is possible, of course, that the City may have been subject to dual legal obligations — one arising from operation of state civil service law and the other arising from entry of a federal court order — in the event that it elected to proceed voluntarily with the layoff program. *Cf. W.R. Grace and Co.* v. *Local Union*, 461 U.S. 757 (1983). If this were the case, federal appellate review would similarly have no bearing on resolution of any back pay claim under state law.

Finally, even assuming that a decision regarding the appropriateness of the district court's 1981 orders may have some impact on the state law claims for back pay, that issue may be adequately decided by the Massachusetts Civil Service Commission. The unions do not assert that there will be a different disposition of the back pay claims if it is the Civil Service Commission, rather than the federal court, that decides the federal issue. Furthermore, there is no reason to question the ability of the Civil Service Commission to reach the correct result. The district court's 1981 orders have been vacated and have no precedential vitality. The principles which will control any determination of federal issues by the Civil Service Commission will be derived, accordingly, from the Court's decision in *Stotts*, not from the district court's 1981 orders. Therefore, regardless of whether certiorari is granted in these cases, an alternative remedy exists by which the unions' members may recover any back pay to which they may be entitled under state law. Review of these cases by the Court is simply unnecessary.

III. The Court of Appeals Correctly Determined that These Cases are Moot.

Following the Court's remand, the court of appeals fully reviewed the facts of these cases in light of *Stotts*. The court of appeals correctly determined that these cases differed from *Stotts* in several important ways and that, unlike *Stotts*, these cases are moot.

When *Stotts* reached the Court, both the minority officers and the petitioning City of Memphis had concrete interests which continued to be adverse and which could be resolved by a decision on the merits. In these cases, by contrast, the parties have no continuing controversy to resolve.

First, in *Stotts*, the minority officers and the City of Memphis continued to dispute the applicability of the lower court's order to future layoffs. *Stotts*, 104 S.Ct. at 2583. There is no such dispute here. The district court's 1981 orders have already been vacated, and, in light of the Court's decision in *Stotts*, the minority officers no longer defend them.[3]

Second, the minority officers in *Stotts* had gained, through operation of the district court's injunction, permanently enhanced seniority benefits. *Id.* at 2584-85. Adjudication on the merits, consequently, would "affect respondents themselves." *Id.* Indeed, Justice O'Connor found this point critical, noting that minority officers had "not waived" their enhanced seniority benefits and that a decision on the merits would resolve their claims to these benefits "in the very litigation in which they were originally won." *Id.* at 2591 (O'Connor, J., concurring). Unlike *Stotts*, the minority officers in these cases have gained no seniority benefits as a result of the district court's 1981 orders. Pursuant to the Tregor Act, all officers who were terminated in 1981 have been reinstated, 1982 Mass. Acts c. 190, § 25, and, in accordance with Massachusetts civil service law, all reinstated officers have had their seniority restored, Mass. G.L. c. 31, § 33. Consequently, a decision on the merits could have no impact on the minority officers' seniority rights. In contrast with *Stotts*, the minority officers in these cases have absolutely no stake in defending the 1981 orders. Regardless of whether the 1981 orders are affirmed or reversed, there is no interest of the minority officers which will be advanced, maintained, impaired or destroyed. Except as to matters of philosophy and principle, the minority officers are, in a word, indifferent.

[3] Before the court of appeals, the minority officers also argued that the district court's 1981 orders were never intended to apply to future layoffs. The court of appeals found it unnecessary to reach this argument, since the 1981 orders had been vacated and since the Supreme Court had reached a contrary result on the merits in *Stotts*.

Third, the lower court's order in *Stotts* restrained the City of Memphis from granting back pay to the laid-off firefighters, and for that reason the City sought appellate review. *Stotts*, 104 S.Ct. at 2584. Here, however, the City of Boston has never been restrained from awarding back pay and has never challenged any restraint imposed upon it. In fact, the City has never taken a position on the merits of the federal issues during the entire course of the federal court proceedings. Moreover, minority officers have never sought to deprive non-minority officers of pay and have no interest now in opposing any award of back pay. If there is a back pay controversy, therefore, it is a controversy between the City and union members which arises under state law and which has a separate forum for adjudication. That controversy is best resolved in the state administrative proceedings where the parties with truly adverse interests can advocate their respective positions.

Fourth, decision on the merits, even reversal of the district court's 1981 orders, would not provide the union members with back pay. The power of a federal court "only extends over and is limited by the conditions of the case now before [it]," *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 370 (1960), *quoting American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904), and there simply are no claims for back pay pending before the federal court. *Compare Alejandrino* v. *Quezon*, 271 U.S. 528, 533-535 (1926) *with Powell* v. *McCormack*, 395 U.S. 486, 497-499 (1969). Accordingly, any decision by this Court would be advisory at best.

Conclusion.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

JAMES S. DITTMAR*,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

BARBARA R. ARNWINE,
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW OF THE
BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145

Counsel for Respondents
**Counsel of Record*

Of Counsel:

RICHARD R. LAVIN,
MATTHEW D. BAXTER,
WIDETT, SLATER & GOLDMAN, P.C.,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

Appendix.

MASSACHUSETTS GENERAL LAWS.

Chapter 31, § 43.

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, so requests in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after the filing of such request and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

The commission shall affirm the action of the appointing authority if it finds that such action is justified. Otherwise it shall reverse such action, and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.